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Editor's Note

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Studies

Collective Administration of Copyright and Neighboring Rights

*Report prepared by the International Bureau of
the World Intellectual Property Organization (WIPO)*

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ANNEX II

Names of Collective Administration Organizations Mentioned in the Report by Their Abbreviations

I. Background

1. Under the Program and Budget of the 1988-89 biennium of the World Intellectual Property Organization (WIPO) adopted by the Governing Bodies of WIPO at their eighteenth series of meetings in Geneva in September 1987 (see documents AB/XVIII/2, Annex A, PRG.02(5) and AB/XVIII/14, paragraph 173), "the International Bureau will prepare...a report on the collective administration of rights protected by and revenues derived from copyright and neighboring rights." The Program and Budget adds that "the report should increase awareness of the advantages of, and questions to be solved for, an effective collective administration."

2. The present document is the report on collective administration of copyright and neighboring rights prepared under the above-quoted item of the Program and Budget.

3. In preparing the report, a great amount of information received from various international

non-governmental organizations and from collective administration organizations has been used.*

4. The basis of this report is, however, much broader than the information made available by international non-governmental organizations. As described in Chapter IV below, in recent program periods WIPO has undertaken various activities that covered several aspects of collective administration. At a number of meetings (committees of experts, groups of experts, the Forum mentioned in paragraphs 213 to 216 below, etc.), governmental experts and experts from intergovernmental and international non-governmental organizations expressed their views on several questions of collective administration. Other program items not involving the convocation of meetings—such as the series of articles mentioned in paragraph 212 below—have also contributed to the discussion of the basic questions relating to collective administration.

5. In the framework of previous WIPO programs, the questions of collective administration were, as a rule, only discussed as one of the aspects of more general themes (such as new uses, problems relating to different categories of works, model provisions of a more global nature, etc.). When, on the other hand, collective administration itself was the central theme (e.g. at the Forum and in the case of the series of articles described in paragraphs 212 to 216 below), the contributions by various experts only dealt with certain particular aspects of that theme, and no real synthesis was made. The purpose of the present report is that collective administration as a new typical way of exercising copyright and neighboring rights should, for the first time, be discussed in a comprehensive manner covering all basic questions of such administration of rights and that, as a result of such a study, certain conclusions could be reached to serve as guidance at the national level and to indicate directions for further WIPO activities in this field.

6. Certain future activities in respect of collective administration are outlined in the Program and Budget of WIPO for the 1990-91 biennium (document AB/XX/2). Under the Program and Budget, which was approved by the Governing Bodies of WIPO at their last sessions in Geneva from Sep-

* This report also takes into account a study, commissioned by the International Bureau, from Professor Gunnar Karlén, Stockholm School of Economics, without, however, incorporating any part of that study in this report; the views expressed in the said study in various respects differ from those reflected by the present report, whose author is Dr. Mibály Ficsor, Director Copyright Law Division, WIPO.

tember 25 to October 4, 1989, "the International Bureau will convene a group of consultants (in the 1990-91 biennium) to consider what advice should be given to governments in respect of the collective administration of certain rights in the field of copyright." The Program and Budget adds that "such advice should be useful in countries in which legislation on the matter is not existing or incomplete or in which the experience in the field is limited."

7. It follows, from the purpose of the present report, that it does not intend to offer a detailed description of the structure and operations of various collective administration organizations, but rather to concentrate on the main characteristics of collective administration of rights. In this context, those characteristics are considered important which are relevant from the viewpoint of two fundamental questions, namely:

— What are the necessary elements and conditions of an appropriate and effective collective administration system?

— What conditions should be met so that such a system be compatible with the international obligations of the countries where such systems exist, particularly with the minimum provisions and the principle of national treatment of the Berne Convention for the Protection of Literary and Artistic Works (hereinafter: "the Berne Convention") and the International Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organizations (hereinafter: "the Rome Convention")?

II. The Notion of Collective Administration and the Role of Such Administration in the Exercise of Copyright and Neighboring Rights

8. The exclusive right of the author to exploit his work or authorize others to do so is the basic element of copyright and such a right, where recognized, is also important for the beneficiaries of the so-called neighboring rights (an expression used for the sake of brevity, traditionally covering the rights of performers, producers of phonograms and broadcasting organizations, but in a wider meaning also other rights, such as the rights of publishers in the typographical arrangement of their books).

9. It is essential to note that the substance of such an exclusive right is not merely of a negative nature; that is, its purpose is not just that, on the basis of it, the owner of the right can exclude others from the exploitation of the work (or the production protected by neighboring rights; hereinafter, when ref-

erence is made to "works," that reference includes such productions, where applicable). He can, of course, do so but the real value of such a right is that, by means of it, it can be guaranteed that works are exploited in a way that corresponds to the intentions and interests of the owner of the right.

10. An exclusive right can be enjoyed, to the fullest extent, if it may be exercised individually by the owner of the right himself. In such a case, the owner maintains his control over the dissemination of his work, he can personally take decisions on the economic conditions of its exploitation and he can also closely monitor whether his moral and economic rights are duly respected.

11. As early as at the time of the establishment of the international copyright system, there were, however, certain rights—first of all, the right of public performance of non-dramatic musical works—that could, only with difficulty, be exercised individually, and since then, with the ever newer waves of new technologies, the field in which individual exercise of rights is impossible or, at least, impractical, has been constantly and rapidly widened. There are ever more cases where individual owners of rights are unable to control the use of their works, negotiate with users and collect remuneration from them.

12. In such cases, the idea emerges, time and again, that, if the exclusive rights concerned cannot be exercised in the traditional, individual way, they should be abolished or reduced to a mere right to remuneration. It is not, however, justified to claim that, if a right cannot be exercised in a way in which it has been traditionally exercised, it should be eliminated or considerably restricted.

13. The reason why, in a number of cases, copyright and neighboring rights cannot be exercised by individual owners of rights is that the works concerned are used by a great number of users. Individuals, in general, do not have the capacity to monitor all those uses, to negotiate with users and to collect remuneration.

14. In such a situation, there is no reason for drawing the conclusion that a non-voluntary license system is needed. There is a much more appropriate option, namely the collective administration of exclusive rights.

15. In the framework of a collective administration system, owners of rights authorize collective administration organizations to administer their

rights, that is, to monitor the use of the works concerned, negotiate with prospective users, give them licenses against appropriate fees and under appropriate conditions, collect such fees and distribute them among the owners of rights. This can be considered as the definition of collective administration.

16. It cannot be denied that, with such collective administration, the control by the owners of rights over certain elements of exercising their rights becomes more or less indirect, but, if the collective administration system functions appropriately, those rights will still preserve their exclusive nature and—although through collective channels—they can prevail in the fullest manner possible under the present circumstances.

17. Although a collective administration system serves primarily the interests of owners of copyright and neighboring rights, such a system also offers advantages to users who, thus, can have access to the works needed by them in a simple manner, and—because collective administration decreases the costs of negotiations with users, of monitoring uses and of collecting fees—fairly cheaply.

18. In paragraph 15 above, the elements of a fully developed collective administration system are outlined. There are certain cases, however, where the owners of rights do not authorize the collective administration organization to undertake all the functions mentioned there, but only some of them (e.g., as described in Subchapter D of Chapter III below, the authors of dramatic works, as a rule, directly negotiate and conclude contracts with theaters, in the framework of which their remuneration is also fixed, and they only entrust the collective administration organization with collecting the remuneration and transferring it to them).

19. There is a form of partial collective administration schemes which needs special consideration, namely the case of non-voluntary licenses where the reason why the administration chain is not full is that the rights themselves which are administered are not full; that is, they are not exclusive rights but mere rights to remuneration. Although collective administration is considered the most appropriate alternative to avoid non-voluntary licenses, collective administration organizations may—and in many cases do—play an important role, also when such licenses are inevitable (even if it is not the collective administration organization which gives licenses, it may negotiate fees and, in general, it collects and, when appropriate, distributes those fees).

III. The Main Fields and Typical Forms of Collective Administration of Copyright and Neighboring Rights

A. *Introductory remarks*

20. The first authors' societies that were more than mere professional associations of authors and also fought for the recognition of authors' rights in their works were established in France.

21. The foundation of the very first society of this type was closely linked to the name of Beaumarchais. He led the legal battles against theaters which were reluctant to recognize and respect authors' economic and moral rights. Those victorious battles led, on his initiative, to the foundation of the Bureau de législation dramatique in 1777, which was later transformed into the Société des auteurs et compositeurs dramatiques (SACD), the first society dealing with the collective administration of authors' rights.

22. Honoré de Balzac, Alexandre Dumas, Victor Hugo and other French writers followed suit in the field of literature more than half a century later when they constituted the Société des gens de lettres (SGDL) whose general assembly met, for the first time, at the end of 1837.

23. However, the events leading to a fully developed collective administration started only in 1847 when two composers, Paul Henrion and Victor Parizot and a writer, Ernest Bourget, supported by their publisher, brought a lawsuit against the Ambassadeurs, a "café-concert" in the Avenue des Champs-Élysées in Paris. They saw a flagrant contradiction in the fact that they had to pay for their seats and meals in the Ambassadeurs, whereas nobody had the intention of paying for their works performed by the orchestra. They took the brave—and logical—decision that they would not pay as long as they were not paid as well. In the litigation, the authors won; the owner of the Ambassadeurs was obliged to pay a substantial amount of fees. Enormous new possibilities were opened for composers and text-writers of non-dramatic musical works by that court decision. It was clear, however, that they would not be able to control and enforce their newly identified rights individually. That realization led to the foundation of a collecting agency in 1850, which was soon replaced by the still functioning Société des auteurs, compositeurs et éditeurs de musique (SACEM).

24. At the end of the last century and during the first decades of this one, similar authors' organizations (so-called performing rights societies) were

formed in nearly all European countries and in some other countries as well. Cooperation developed rapidly among those organizations and they felt a need for an international body to coordinate their activities and contribute to a more efficient protection of authors' rights throughout the world. It was in June 1926 that the delegates from 18 societies set up the International Confederation of Societies of Authors and Composers (CISAC). The membership of CISAC has been constantly widening since then and now also includes, in addition to the more traditional ones, societies dealing with other types of works (such as works of fine art and audiovisual works).

25. Authors' societies may be set up with different objectives; however, the most fundamental one—the very *raison d'être* of such organizations—is the collective administration of authors' rights. This is also reflected in the Statutes of CISAC. Under Article 5 of the Statutes, only societies administering authors' rights may be admitted to CISAC as ordinary members.

26. By a society administering authors' rights, is to be understood, according to the same Article of the Statutes of CISAC, an organization which

- “(i) has as its aim, and effectively ensures, the advancement of the moral interests of authors and the defense of their material interests; and
- “(ii) has at its disposal effective machinery for the collection and distribution of copyright royalties and assumes full responsibility for the operations attaching to the administration of the rights entrusted to it; and
- “(iii) does not, except as an ancillary activity, administer also the rights of performers, phonogram producers, broadcasting organizations or other holders of rights.”

27. An organization which fulfills only the first or only the second of the above-mentioned conditions can be admitted only as an associate member of CISAC. It is generally the second condition that certain authors' organizations are unable to meet.

28. The expression “authors' societies” is used traditionally not only when real societies fulfill those basic functions, but also in cases where, for example, public or semi-public organizations do the same.

29. Later—with the new technological developments which led to the birth of new categories of creations and to new ways of using protected works,

as well as to the recognition of certain neighboring rights—new types of collective administration organizations were formed and they established new international non-governmental organizations. This does not, however, change the fact that the activities of the performing rights societies still represent the fullest system of collective administration of rights (whose methods are often followed by collective administration organizations also in other fields). It is, therefore, not only for historical reasons that, in the present report, the description of the various fields of collective administration starts with the presentation of the collective administration of performing rights in the so-called “small rights” musical works.

B. Collective administration of performing rights in “small rights” musical works

30. The first full collective administration systems, as mentioned above, were established for the administration of certain rights in certain categories of musical works. The musical works concerned were the so-called “small rights” works and the rights involved were the so-called “small rights” or, in other words, the so-called performing rights.

31. “Small rights” musical works are those which as a rule, are administered collectively, and “grand rights” musical works are those which, as a rule, are administered—or, at least whose use is licensed—individually. The latter category consists, practically, of dramatico-musical works. The use of such works takes place in a relatively small range of locations; thus, direct licensing by authors is feasible both practically and economically. Non-dramatic musical works, on the other hand, are used much more frequently and at a much greater number of places; that is why their use cannot, from a practical point of view, be administered individually. The delimitation of those categories is, however, more complex than just stating that non-dramatic musical works are “small rights” works and dramatico-musical works are “grand rights” works. Although this is basically true, there are some borderline questions in respect of which some further clarification, and—in the authorization given to collective administration organizations by authors, as well as in the reciprocal representation contracts between such organizations—some further precisions are necessary. E.g., the non-dramatic performances of certain autonomous parts (such as arias and songs) of dramatico-musical works are considered “small rights” performances; on the other hand, the questions of how and under what conditions “small rights” non-dramatic musical works

can become parts of "grand rights" works—or form together, in a compilation, such works—raise a number of delicate legal problems. (It should be added that, although the traditional "small rights"—"grand rights" classification is still generally accepted, it may lose its significance within the widening of the scope of rights collectively administered.)

32. At the time of the establishment of the first musical performing rights societies, "performing right" simply meant the right to perform a work by performing artists in the presence of an audience. Since then, however, the notion of performing rights administered by such societies has become much broader. The CISAC "Model Contract of Reciprocal Representation between Public Performance Rights Societies" (hereinafter referred to as the "CISAC Model Contract"), e.g., contains the following definition: "Under the terms of the present contract, the expression 'public performances' includes all sounds and performances rendered audible to the public in any place whatever within the territories in which each of the contracting Societies operates, by any means and in any way whatever, whether the said means be already known and put to use or whether hereafter discovered and put to use during the period when this contract is in force. 'Public performance' includes, in particular, performances provided by live means, instrumental or vocal; by mechanical means such as phonographic records, wires, tapes and sound tracks (magnetic and otherwise); by processes of projection (sound film), of diffusion and transmission (such as radio and television broadcasts, whether made directly or relayed, retransmitted, etc.) as well as by any process of wireless reception (radio and television receiving apparatus, telephonic reception, etc., and similar means and devices, etc.)."

33. As the above-quoted definition also reflects, the notion of performing rights is much wider now than it was when the performing rights societies started operating. Such rights include, in addition to the right of public performance, also the right of broadcasting and the right of communication to the public in general (through cable, loudspeakers, etc.).

34. It should be added to the notions described above that the adjectives "small" and "grand," in the expressions "small rights" and "grand rights," do not necessarily indicate the economic importance of the rights involved. In many countries, the amounts collected on the basis of "small rights" are much bigger than those collected on the basis of "grand rights." Those adjectives only reflect the

historical fact that "grand rights" had already been exercised when "small rights" were recognized and, through collective administration organizations, enforced in practice, and, initially, the category of "grand rights" was considered much more important.

35. Performing rights organizations are, in general, societies of authors (in addition to the already mentioned SACEM in France, e.g., ASCAP in the United States of America, PRS in the United Kingdom, GEMA in the Federal Republic of Germany, SIAE in Italy, SGAE in Spain, SUISA in Switzerland, ZAIKS in Poland, SADAIC in Argentina, etc.*). The status of those societies differs in various respects, e.g., in respect of the form and extent of government supervision; in respect of whether they administer exclusively performing rights (such as SACEM, PRS) or also administer so-called mechanical rights (such as GEMA, SUISA) or they are general societies of authors administering the rights in practically all categories of works (such as SIAE, SGAE); in respect of whether they are the only collective organizations to deal with performing rights (which is the case, in general) or there are more such organizations in this field (e.g., in the United States of America where there are three such organizations: ASCAP, BMI and SESAC).

36. In certain countries, there are private bodies administering performing rights other than societies of authors (e.g. BMI, in the United States of America which is a corporation founded by broadcasting organizations).

37. Still in other countries—namely in some Eastern European countries and in a number of developing countries, mainly in Africa—public or semi-public copyright organizations administer performing rights—along with other rights in practically all categories of works—(e.g., VAAP in the Soviet Union, ARTISJUS in Hungary, JUSAU-TOR in Bulgaria, ONDA in Algeria, BMDA in Morocco, BSDA in Senegal, SOCADRA in Cameroon, etc.).

38. Although it is in the field of musical performing rights where the network of collective administration organizations is the most developed one, there are still a number of countries where no such organizations exist or, even if they exist in principle, they do not function in practice.

* The full names of these organizations as well as other collective administration organizations mentioned in the present report by their abbreviations are indicated in Annex II.

39. As a rule, composers and text-writers transfer their performing rights to the collective administration organization either for a certain period, or, and that is more frequent, without time limit, and this transfer also covers future works. The transfer is made on the basis of the conditions laid down in the statutes and regulations of the organization which the authors either explicitly or implicitly accept when they join the organization. Generally, the organization is in an exclusive position to license the use of the works included in its repertoire; the authors themselves cannot, in general, exercise their performing rights thus transferred. There are, however, certain countries—mainly those where antitrust legislation is applied also in respect of collective administration organizations—where the possibility of individual licensing is maintained for authors. It is also in those countries that sometimes the minimum period of transfer of rights is restricted to a certain number of years (three to five).

40. In still other countries, collective administration organizations do not have membership but only act as representatives of the composers and text-writers whose performing rights they administer. That is the case, *inter alia*, in countries where public or semi-public organizations administer such rights.

41. Irrespective of the legal basis of the collective administration of performing rights, the repertoire of a collective administration organization is, as a rule, at the outset, a national repertoire, which, in itself, is not sufficient to license globally the use of protected musical works. An authorization to administer foreign performing rights is, however, obtained by means of bilateral agreements with the performing rights organizations of other countries. Thus, all national organizations can license the use of, practically, the entire world music repertoire.

42. Bilateral agreements are based on the CISAC Model Contract. Under Article 3(I) of that Model Contract, "each of the contracting parties undertakes to enforce, within the territory in which it operates, the rights of the members of the other party in the same way and to the same extent as it does for its own members, and to do this within the limits of the legal protection afforded to a foreign work in the country where protection is claimed, unless, in virtue of the present contract, such protection not being specifically provided in law, it is possible to ensure an equivalent protection. Moreover, the contracting parties undertake to uphold to the greatest possible extent, by way of the appropriate measures and rules, applied in the field of royalty distribution, the principle of solidarity, as

between the members of both Societies, even where, by the effect of local law, foreign works are subject to discrimination. In particular, each Society shall apply to works in the repertoire of the other Society the same tariffs, methods and means of collection and distribution of royalties as those which it applies to works in its own repertoire."

43. The main instrument of licensing "small rights" performances and broadcasts is the blanket license which, as a rule, authorizes users to use any musical works from the world repertoire for the purposes, and within the period, indicated in the license. The transfer of rights in the national repertoire—or the authorization on some other legal basis to represent those rights—and the network of bilateral agreements enable national organizations to grant such global licenses. There could, however, be some exceptional cases where certain protected works still do not belong to the repertoire administered by the organization. In such cases, various legal techniques exist—discussed, more in detail in Subchapter G of Chapter V below—which can guarantee the operation of the blanket license system without creating legal insecurity for users and without unreasonably restricting the rights of the authors concerned.

44. In certain countries—mainly in those where this follows as an obligation from the application of antitrust laws—performing rights organizations also offer licenses other than blanket licenses; e.g. "per program licenses" which are, as their name indicates, licenses for particular programs. Furthermore, users may elect to operate outside the collective administration scheme and try to obtain direct licenses from authors. It shows the obvious advantages of blanket licenses that, even if the above-mentioned other licensing forms are available, users, in general, do not make use of them and keep choosing blanket licenses.

45. Normally, tariffs and other conditions of licenses are negotiated with associations of users. The effect of the negotiated agreements depends on the extent to which the association of users may legally bind its members. If the agreement concluded by the association binds its members, the tariffs and conditions agreed upon are directly applicable; otherwise the agreement is considered as a model contract which, in certain cases and in certain respects, may be set aside. There may be users that are not members of the association and, thus, individual negotiations may be needed with them. If the collective administration organization has a global agreement with the association of users to the category to which such "dissident users" belong, that global agreement has, at least, an indirect

influence when the tariffs and other conditions are set in separate agreements. There are, however, certain important users, e.g., national broadcasting organizations, in the case of which not only individual negotiations take place but also individual tariffs and conditions are applied.

46. In the majority of cases, there is some kind of State control on the licensing practice of performing rights organizations. It is relatively rare that it is only normal civil courts which deal with disputes that may emerge between such organizations and users. Although there are some intermediary forms, two basic means of government control may be distinguished: The first is a kind of government approval of contractual agreements and the second is the functioning of special tribunals to deal with conflicts between collective administration organizations and users. In certain cases, such a control may be considered as a guarantee against possible abuses of the *de facto* monopoly position of collective administration organizations, but fairly frequently it goes further and may involve regular and active interference in the licensing practice and tariff system of the collective administration organization.

47. The distribution of royalties is based on two main elements. The first one is an appropriate documentation system and the other is the data on the actual use of works.

48. One of the most important purposes of the technical cooperation between CISAC member organizations is the standardization of the "international fiches" and other forms of information to be regularly exchanged between member organizations. What is involved is an enormous amount of data the handling of which may become a heavy burden, first of all to small societies. It should also be taken into account that the majority of such data belongs to the so-called "sleeping repertoire," that is, to works that are not actually used. Several attempts have been made to try and simplify documentation exchange and rely on electronic data processing. For this purpose, certain narrower but much more practical lists of works and of right owners have been prepared and are regularly updated and made available through an electronic support system, such as the CAE (the list of copyright owners (composers, authors and publishers) showing their membership in various societies), the WWL (the worldwide list of the most frequently used works) or the GAF (general agreement file).

49. While the documentation of the world music repertoire is, in general, sufficient, or even disturbingly abundant, the collecting of data on the actual

use of works raises just the opposite problem for collective administration organizations; namely, it is fairly hard to get those data.

50. The ideal solution would be to obtain all the data concerning all performances of all works and to distribute the royalties accordingly. This is, however, impossible, or, at least, not feasible. While, in certain cases (such as television and radio programs, concerts, etc.), it is relatively simple to collect full information on programs, in other cases, it is only theoretically possible. For instance, in the case of performances in hotels, dance balls, bars, discotheques, etc., either the users would have to be burdened with the obligation to follow all the performances by orchestras, "disc jockeys," juke boxes, etc., and to prepare precise records with all the data necessary for the collective administration organization, or the collective administration organization would have to employ inspectors to do the same job. The first solution cannot be realistically proposed as a general one; users may—and should—be responsible for making available all the data they have, but could hardly be obliged to do such intensive and time-consuming work. The other solution would need the employment of a sufficient number of inspectors to follow and note all details of all musical programs and would involve such high costs that, although all the data might be ready for a perfect distribution, practically no money would remain to be distributed (not to mention the further costs that would arise from the processing of the great amount of data).

51. For the reasons mentioned above, performing rights organizations have to strike an appropriate balance between two conflicting interests, namely the interest of creating a reliable basis for the distribution of royalties, and the interest of avoiding costs as a result of which the amount to be distributed would be unreasonably decreased. As a consequence, an element of "rough justice," more or less, but necessarily, appears in the distribution system.

52. As a rule, performing rights societies obtain full information on programs from broadcasting organizations (sometimes, mainly if there is a great number of such organizations in the country, only from the major ones) and in respect of concerts and recitals of "classical" music and of certain other live concerts and events. Otherwise, in general, a sampling system is applied. The sampling methods of certain organizations are fairly thorough; e.g., the inspectors of the organization visit practically all the places (restaurants, music halls, bars, etc.) regularly where music is used and collect information on programs containing the list of musical works performed. Other organizations apply a

much more selective sampling system; only a relatively small amount of information is obtained which is considered to reflect the structure of the use of works by a specific category of users. Still in other cases, practically no information is collected from certain categories of users (but the royalties paid by such users are distributed by reference to repertoire information furnished by selected professional organizations or on the basis of, e.g. sales charts, top lists and radio logs).

53. It goes without saying that, through the sampling system, performing rights societies may influence the distribution of royalties in favor of certain categories of works and, consequently, to the detriment of others. They may, for instance, collect programs to a fuller extent and more frequently from users who use more works belonging to the national repertoire than from other users who mainly use foreign works. Such "protectionist" sampling systems are, however, in conflict with the principle included in Article 7(I) of the CISAC Model Contract which reads as follows: "Each Society undertakes to do its utmost to obtain programs of all public performances which take place in its territories and to use these programs as the effective basis for the distribution of the total net royalties collected for those performances."

54. The CISAC Model Contract contains a strict regulation concerning deductions from the royalties for purposes other than distribution. Its Article 8 provides as follows: "Each Society shall be entitled to deduct from the sums it collects on behalf of the other Society the percentage necessary to cover its effective administration expenses. This necessary percentage shall not exceed that which is deducted for this purpose from sums collected for members of the distributing Society, and the latter Society shall always endeavor in this respect to keep within reasonable limits, having regard to local conditions in the territories in which it operates.... When it does not make any supplementary collection for the purpose of supporting its members' pensions, benevolent or provident funds, or for the encouragement of the national arts, or in favor of any funds serving similar purposes, each of the Societies shall be entitled to deduct from the sums collected by it on behalf of the co-contracting Society 10% at the maximum, which shall be allocated to the said purposes."

55. The administrative costs of the performing rights organizations are, in general, around 20–30% of the amount of royalties collected. There are, however, certain societies which keep their costs below 20%, and there are still others which are more expensive: they use more than 30% of the

royalties for covering their costs. However, the percentage of the administrative costs cannot be regarded in itself higher than justified or lower than a standard level; much depends on the intensity and the precision of the activities of the organization. The operations of some organizations are fairly simplified and what they do for the owners of the rights administered by them is only a very rough justice, if any, while the collection and distribution system of other organizations is much more thorough, which really guarantees that the right owners receive royalties in proportion to the actual use of their works.

56. The majority of organizations make use of the possibility of deducting not more than 10% from all royalties collected for cultural and social purposes. In certain cases, the percentage of the deduction is only 2, 3 or 5% but it is more frequently 10%. The amounts thus deducted are used partly for health insurance and pension funds of national authors and partly for the promotion of national contemporary music (bonus payments for outstanding creative activity, prizes, fellowships, etc.).

57. The distribution rules of the performing rights organizations are fairly complex. Those rules generally include an elaborated point system to reflect the relative importance of the works and performances. It is quite understandable—and accepted by all interested parties—that the number of points express, *inter alia*, the length of the work. The point system, however, also contains differences on certain less objective bases in respect of which an aesthetic evaluation may play a decisive role. It is, e.g., fairly general that "serious" works receive many more points than "recreational" works of the same length.

58. It goes without saying that whatever point system is applied by a collective administration organization, the organization is obliged to use exactly the same system in respect of the members of its sister organizations as in respect of its own members. This principle is, in general, respected. It is another matter, however, that the percentage of the royalties distributed to nationals, on the one hand, and to foreigners, on the other, may still be influenced through the point system (e.g. by means of "allocating" more points to the categories of works (e.g. to folklore-related works) where there are more works created by the members of the organization than in other categories).

59. Finally, the value of the royalties distributed also depends on the frequency of distribution and on the promptness of transferring the amounts due

to authors and to sister organizations. Article 9(I) of the CISAC Model Contract contains the basic provision in this respect. It reads as follows: "Each of the contracting Societies shall distribute to the other the sums due under the terms of the present contract as and when distributions are made to its own members, and at least once a year." The CISAC Model Contract also contains detailed provisions on possible sanctions against debtor societies that do not respect the above-quoted provision. In general, that provision is respected, but not by all societies.

C. *Collective administration of mechanical rights*

60. The expression "mechanical right" is generally understood as being the author's right to authorize the reproduction of his work in the form of recordings (phonograms or audiovisual fixations) produced "mechanically" in the widest sense of the word, including electro-acoustic and electronic procedures. The most typical and economically most important mechanical right is the right of the composers of musical works—and the authors of accompanying words—to authorize the sound recording of such works.

61. As mentioned in paragraph 35 above, certain collective administration organizations administering musical performing rights also administer so-called mechanical rights in musical works. In other countries, separate organizations have been set up for the administration of mechanical rights, e.g., AUSTRO-MECHANA in Austria, SDRM in France, MCPS in the United Kingdom, NCB for the Nordic countries and AMRA in the United States of America which are societies administering the rights of both the authors and music publishers, and the Harry Fox Agency in the United States of America which is the agent of musical publishers. Those separate organizations cooperate very closely with the musical performing rights organizations.

62. The legal status and structure of mechanical rights organizations as well as the way in which they obtain the right to license the national and international repertoires are similar to what is described above in respect of performing rights societies, and there are also a number of similar features in the methods and techniques used in the administration of those two groups of organizations. At the same time, there are some significant differences, too.

63. One difference follows from the provisions of the Berne Convention itself. While, in the case of

the so-called performing rights, it is only in respect of one category of those rights—namely, the right of broadcasting and the simultaneous and unchanged retransmission of the broadcast of works—that the Berne Convention allows, exceptionally, under certain conditions, non-voluntary licenses (see Article 11^{bis}(2) of the Convention), the possibility of non-voluntary licenses plays a much more essential role in the case of mechanical rights. Article 13(1) of the Berne Convention reads as follows: "Each country of the [Berne] Union may impose for itself reservations and conditions on the exclusive right granted to the author of a musical work and to the author of any words, the recording of which together with the musical work has already been authorized by the latter, to authorize the sound recording of that musical work, together with such words, if any; but all such reservations and conditions shall apply only in the countries which have imposed them and shall not, in any circumstances, be prejudicial to the rights of these authors to obtain an equitable remuneration which, in the absence of agreement, shall be fixed by the competent authority."

64. Various countries apply non-voluntary licenses along the lines of the above-quoted provisions of the Berne Convention (e.g. India, Ireland, Japan, Romania, Switzerland, United States of America). In those countries, the law itself or a competent authority, as a rule, determines the royalties to be paid for such recordings. In certain countries, however, there is room to negotiate some elements of the royalty system.

65. Experience shows that phonogram industries can function smoothly and without any unreasonable obstacles as regards access to the rights needed by them also in countries where the exclusive nature of mechanical rights is not restricted and those rights are administered collectively. Therefore, it is suggested ever more frequently that this kind of non-voluntary licenses is not justified; collective administration is a more appropriate option. There are various countries where concrete proposals have been made accordingly and, e.g., the Copyright, Designs and Patents Act 1988 of the United Kingdom has eliminated such a non-voluntary license which existed before in that country.

66. A further important difference—in relation to the collective administration of performing rights—can be seen in the specific role of the International Bureau of Societies Administering the Rights of Mechanical Recording and Reproduction (BIEM) which is an international non-governmental organization grouping mechanical rights organizations.

67. Originally, BIEM was created as a French civil law society in 1929. Since then, however, both its legal nature and its main functions have varied. In a certain period, it acted as a centralized agency for all its member organizations and negotiated royalties with phonogram industries and took care itself of the collection of those royalties. Presently, each member organization collects royalties due by national phonogram producers but the role of BIEM as a centralized negotiating body has been maintained.

68. One of the main negotiating partners of BIEM is the International Federation of the Phonographic Industry (IFPI) which was established in 1933. A standard contract exists between BIEM and IFPI which is revised from time to time and which is implemented by means of individual contracts between national BIEM societies and individual producers. The existing standard contract prevails in all the member countries of the European Communities, including the United Kingdom where it is going to be introduced shortly, and, furthermore, in the Nordic countries, Austria, Czechoslovakia, the German Democratic Republic, Hungary and Poland as well as in Israel. Certain member organizations of BIEM (such as JASRAC (Japan)) are full members of BIEM but the standard contract is not directly applicable to them because of the specific legal situation in their countries. Some other organizations (such as the Harry Fox Agency (United States of America)) are not full members of BIEM but only associated members.

69. The centralized negotiating power of BIEM and the binding nature of the BIEM/IFPI standard contract may influence national organizations that do not agree with certain provisions of the standard contract not to join BIEM, or leave it if they are members, and conclude agreements directly with national associations of phonogram producers or with individual producers themselves. For instance, GEMA, which administers, *inter alia*, mechanical rights, left BIEM in 1986 for such reasons; but later—in 1988—it rejoined BIEM.

70. The BIEM/IFPI standard contract covers, *inter alia*, the following subjects: the authorization to use the BIEM repertoire (the so-called world repertoire on the basis of which, in the countries of BIEM member organizations, in 1986, nearly 700 million records and more than 350 million prerecorded cassettes were produced), the determination of the royalty rates and the method of their calculation, the place (whether in the country of manufacture or the country of sale) and time schedule of the payment of the royalties, conditions of

exportation, certain exceptions to the obligation to pay royalties (free copies for promotion, returns, etc.), audit of the number of copies reproduced.

71. The last version of the global standard contract was originally concluded in 1975 and since then it has been amended four times. The last amendment entered into force on January 1, 1988. That amended version of the standard contract differentiates between analogue records and cassettes, on the one hand, and compact discs, on the other. In the case of analogue records and cassettes, the rate of royalties is 11% of the highest price published by producers to dealers, subject to an adjustment of 4% for discounts/rebates and a 10% packaging and cassette deduction, while, in respect of compact discs, the rate is calculated in the same way as in the case of analogue discs and cassettes, but there was a 20% additional transitory deduction in 1988 which has been reduced to 15% for 1989 and will be reduced to 10% in 1990, before being completely eliminated in 1991 (this transitory deduction has been agreed upon because, until the end of 1987, the royalty rate of compact discs was not calculated on the basis of the actual price of such discs, but on that of the price of similar analogue records).

72. The distribution system of mechanical rights societies also differs in various aspects from that of performing rights societies.

73. The first difference concerns deductions from royalties before actual distribution. While performing rights organizations, as mentioned in paragraph 54 above, deduct the real costs of administration, mechanical rights organizations use certain standard deduction percentages, such as 15%, 20% or 25%. Those standard percentages are adapted to the actual costs of the organizations, but still there is a difference between actual costs and the amount deducted, the latter as a rule being, at least slightly, higher. This is counterbalanced by the fact that the bilateral agreements between mechanical rights organizations, in general, do not contain the possibility of deductions for social and cultural purposes.

74. There is, however, a further peculiar aspect of the deduction rates applied by the mechanical rights organizations. Although bilateral agreements contain the principle of equal treatment of nationals and foreigners, this principle is not necessarily followed when it comes to deductions. In certain cases, the deduction from royalties due to foreigners is higher than the one from royalties due to nationals (e.g., sometimes, from nationals' royalties, 5%, and from foreigners' royalties, 10 to 25% is deducted depending on the bilateral contracts).

75. The distribution system of mechanical rights organizations also contains certain elements that are favorable from the viewpoint of non-members and foreigners. Distribution is made on the basis of full data concerning the actual use of works and not on the basis of samples and there is no point system where subjective elements could prevail.

76. Some mechanical rights organizations also administer so-called synchronization rights (the right to authorize the inclusion of musical works in audiovisual works). The same principles apply to the administration of such rights but there is no general standard contract in this field and there are further differences in respect of certain details.

D. Collective administration of rights in dramatic works

77. The collective administration of rights in dramatic works is the most typical—and most traditional—example of a type of partial collective administration, namely, the agency-type collective administration.

78. This form of collective administration was originally developed by SACD, the French authors' society referred to in paragraph 21 above, which was the first authors' society dealing with collective administration of its members' copyrights.

79. It was as early as in 1791 that, in the framework of SACD, a General Agency was set up in Paris with representatives in major provincial centers. The authors informed the society, and, through it, the theaters, of the general conditions (including, particularly, royalty rates) on the basis of which they were ready to negotiate about the authorization of the use of their dramatic (or dramatico-musical) works. Then, following those general contractual conditions, specific contracts were concluded, and the General Agency of SACD collected and—after the deduction of the costs—distributed the royalties to the authors. Although there are certain new elements in its activities, the collective administration system of SACD has remained practically the same. This system contains three main elements: general contracts, specific contracts and the actual collection and distribution of royalties on the basis of the specific contracts.

80. General contracts are negotiated between the society and the organizations representing theaters. Such contracts include certain minimum conditions, particularly the basic royalty rate (which, e.g., in Paris, is 12% of gross receipts). In specific contracts, no conditions can be stipulated that are

less favorable to authors, but better conditions can be agreed upon.

81. Specific contracts are concluded theater by theater and work by work based on the minimum conditions of the applicable general contract (with possible more favorable conditions). Unlike musical performing rights societies, to which the authors' rights are transferred or which otherwise are in a position to exercise the rights in their repertoire, and, thus, to authorize the use of the works concerned without separate consultation with the authors, SACD has to ask for the authors' agreement for all specific contracts. The society acts only as a representative.

82. There is a much simpler system in the field of amateur theaters. Here, the costs following from the elements of the individual exercise of rights would be fairly heavy. Therefore, the authors are invited to transfer to the society—with some restrictions, and under certain conditions—the right to authorize performances in the framework of the general contract concluded with the Federation of Amateur Theaters. Many authors choose this simplified system.

83. The representatives of SACD regularly monitor theater performances in the areas for which they are responsible and collect the royalties. The royalties are distributed immediately to the authors—without any specific distribution pools or point systems similar to the ones existing in the field of musical performing rights—who own the rights in the works for the performance of which the royalties are paid.

84. The society deducts from the royalties the established commission rate (8–9.5% depending on geographic areas) and a social security contribution. Depending on the financial results of the accounting periods, a part of the amount deducted may be paid back to the authors concerned because SACD follows the principle that only the actual administration costs can be deducted.

85. SACD also administers rights in works broadcast on radio and television and in audiovisual works. In this field, full collective administration prevails. The authors give full authorization to SACD to exercise their exclusive rights. SACD negotiates agreements with broadcasters, collects royalties and distributes them to individual owners of rights.

86. As mentioned above, collective administration of rights in dramatic works is not a form of full collective administration: it is of an agency-type

administration. In harmony with this fact, in many countries, it is not authors' societies or other copy-right organizations which administer such rights but rather real agencies (in many cases, several agencies—with various repertoires—in the same country). Still, there are a number of countries where collective administration organizations deal with the said rights. Those organizations, however, in the majority of cases, are not so specialized as SACD is; most of them have a very wide repertoire, often also covering musical performing rights and mechanical rights.

87. Irrespective of the scope of their activities, authors' organizations administering rights in dramatic works cooperate under the aegis of CISAC, although this cooperation does not extend to so many details as the one between performing rights organizations.

E. Collective administration of the droit de suite

88. Under paragraph (1) of Article 14^{ter} of the Berne Convention, "[t]he author, or after his death the persons or institutions authorized by national legislation, shall, with respect to original works of art and original manuscripts of writers and composers, enjoy the inalienable right to an interest in any sale of the work subsequent to the first transfer by the author of the work."

89. Paragraphs (2) and (3) of the same Article, however, give much liberty to countries party to the Convention in respect of the recognition and regulation of such a right. They are free to decide whether or not to introduce it, and its enjoyment is subject to reciprocity. Furthermore, the procedure for collection and the amounts are matters for determination by national legislation.

90. In spite of the non-obligatory nature of Article 14^{ter}(1) of the Berne Convention, a number of countries recognize the *droit de suite*, such as Belgium, Brazil, Chile, Congo, Costa Rica, Côte d'Ivoire, Czechoslovakia, Ecuador, France, Germany (Federal Republic of), Guinea, Hungary, Italy, Luxembourg, Mali, Morocco, Peru, Philippines, Portugal, Senegal, Spain, Tunisia, Turkey, Uruguay and Yugoslavia.

91. The *droit de suite*, as a rule, covers original works of art; in some countries, however, it also covers original manuscripts. (Nevertheless, also in those countries, it is in the field of works of art that this right is really significant.) It is fairly rare that the *droit de suite* is extended to all sales (that is the case in Brazil, Portugal, Uruguay). The great ma-

jority of countries only applies this right to public auction sales and some of them also to sales through dealers. (The reason is to restrict the scope of the right to cases where it can be realistically exercised and enforced.)

92. The methods of calculation of *droit de suite* levies fall into one of two categories: those which calculate such levies on the basis of the increase in the price of the work at each resale and those which base their levies on the selling price of the work. Certain threshold prices, however, are determined below which the *droit de suite* is not applicable. In the first group of countries, the rate (because it only covers the "increased value" attributed) is, in general, higher than in the second category. In the great majority of countries the levy is chargeable to the seller; in Hungary, however, it is chargeable to the buyer.

93. The reason why the *droit de suite* is not even more widespread is that certain countries have some misgivings concerning possible practical problems that may emerge in the field of exercise and enforcement of this right. Those misgivings are not unfounded to the extent that there are countries where practical problems do exist. The example of other countries shows, however, that those practical problems can be avoided by means of an appropriate regulation of the exercise of this right and through the application of an appropriate collective administration system.

94. The best example of a solution to practical problems through collective administration is the case of the Federal Republic of Germany.

95. In that country, the *droit de suite* was introduced by the Copyright Law of 1965 and it is applied not only in case of public auction sales but also in case of sales through art dealers. However, the law originally did not lay down any specific procedure for the application of this right. Auctioneers and dealers refused to pay the *droit de suite* levies on the ground that they were not the true vendors and, at the same time, used the requirement of professional secrecy as a pretext for not disclosing the name and address of the true vendors. Following a long legal battle, the Federal Supreme Court decided, in 1971, that auctioneers and dealers might decline to disclose the identity of the vendor, but only on condition that they themselves pay the *droit de suite* levies. There was, however, no general obligation to provide information.

96. The Law of November 10, 1972 completed the regulation on the *droit de suite*. That Law introduced a general obligation of information, deter-

mined the rate of levies as 5% of the resale price with a 100 DM threshold price. In the new legislation, authors' societies have been given an important role. It is only an authors' society that is empowered to request information, so as to save auctioneers and dealers from being overwhelmed with individual requests.

97. In 1980, a further important step was made to make use of the possibilities of collective administration. An agreement was signed between BILD-KUNST, the authors' society administering the rights of artists, on the one hand, and the organizations of art dealers, on the other. The agreement covered 20th-century works. The art dealers have undertaken to pay 1% of their full turnover in sales of all 20th-century works of art. This rate was based on an estimation according to which the art dealers' turnover was 100 million DM a year and the payments due in respect of the *droit de suite* and of social security payments to artists introduced in 1980 amounted to 1.5 million DM. It was agreed that, if the lump sum thus calculated fell below the level based on that situation, further negotiations would take place. BILD-KUNST deducts 20% for administration costs. According to the distribution scheme of the society, 10% is deducted from the authors' heirs for a fund to support living artists, whereas living artists accept a deduction of 10% for social security payments and a further 10% for a fund to support creativity.

98. In France, prior to the 1957 Law, the arrangement was that, if the owner of the right met certain formalities (declaration), a public official deducted the *droit de suite* levy from the sum to be paid to the vendor. The amounts were then held at the disposal of the artist for three days after the sale and handed over to his agent or the artist himself. If the deducted levies were not claimed the responsible public official was required to inform the beneficiary by registered letter within one month. When three months had elapsed from the date of the sale, the official's responsibility was discharged by paying the sum deducted to the seller.

99. Since the 1957 Law came into force, the above-mentioned system has been set aside and arrangements for the supervision and collection of *droit de suite* levies have been laid down by agreements between the authors' societies and the National Chamber of Auctioneers, taking previous practice into account.

100. The membership of, and any new admission to, the authors' societies (SPADEM and ADAGP) is reported to the Secretariat of the National Chamber of Auctioneers, which informs its membership.

The sales catalogs or lists of works presented for sale are also regularly sent to the authors' societies. Using these, as well as bulletins on auction sales, the authors' societies exercise close supervision over these events. Their agents attend certain sales, particularly those which take place without a catalog and without advertising. On the basis of this information, the authors' societies draw up a list of the works of their members which are up for sale and qualify for *droit de suite* levies; they send this list to the auctioneer concerned shortly before the sale. The auctioneer marks on it the selling price of each work and returns it, together with the *droit de suite* levy, to the appropriate authors' society. This simple procedure makes the collection of *droit de suite* levies easy and cost-effective.

101. In Hungary, there is also a very simple system in force, in which HUNGART, the collective administration organization plays a decisive role. The *droit de suite* levies (5% of the resale price) have to be transferred to this organization which, after the deduction of administrative costs, pays them to the owners of rights.

102. The role of collective administration organizations is getting more important in the field of works of art not only in respect of the *droit de suite* but also in respect of other rights of artists. E.g., reprography also concerns works of art and such works may also be concerned by cable transmissions (see in that respect the following subchapters).

103. In addition to BILD-KUNST, SPADEM, ADAGP and HUNGART, there are some other collective administration organizations which deal with rights in works of art, such as VBK in Austria, VIS-ART in Canada, DDG BEELDRECHT in the Netherlands, BONUS in Sweden, DACS in the United Kingdom, VAGA in the United States of America. A number of organizations of more general repertoire administer the rights in works of art along with the rights in various other categories of works. All those organizations cooperate closely under the aegis of CISAC.

F. Collective administration of reprographic reproduction rights

104. Reprography was the first major technological development after the 1971 Paris revision of the Berne Convention which raised serious copyright problems and in respect of which it was found that collective administration of rights was the best possible solution.

105. While in the case of the rights whose collective administration has been discussed so far (performing rights in musical works, mechanical rights, rights in dramatic works, the *droit de suite*) it is fairly clear and practically undisputed to what extent and under what conditions they had to be recognized under the Berne Convention, in respect of reprography, there have been certain questions raised as to the actual rights to be recognized and to the very legal nature of such rights. It very much depends on the answers to those questions, in which cases and under what conditions collective administration may prevail in this field.

106. Reprographic machines have become ever more sophisticated during the last decade in all important aspects: they are of smaller size and, at the same time, produce better quality, more quickly and more cheaply. The recent appearance of color copiers on the market has opened new avenues for the reprographic reproduction of protected works, not to mention the combination of reprography with the retrieval of works stored in computers (the so-called electrocopying).

107. The situation in the field of reprography is, in some respects, different from the one which prevails in the field of copying of audiovisual works and phonograms. This difference follows from the fact that while home taping (that is, the reproduction of audiovisual works and phonograms, at home, for private purposes) is a global phenomenon, the number of personal photocopying machines is still relatively small. Therefore, the control of the reproduction of works by means of reprography can be organized more easily and there are much better chances of avoiding the restrictions of the right of reproduction as an exclusive right of authors.

108. It should, however, also be taken into account that the functions of reprographic reproduction differ from those of home taping. While home taping concerns mainly works of entertainment, reprography is, typically, used for copying of material necessary for education, research and library services in respect of which special public considerations prevail. Those considerations may be invoked as a basis for certain restrictions of authors' exclusive rights.

109. From the viewpoint of the legal situation in respect of reprography, the first and most important fact is that the right of reproduction is an exclusive right under the Berne Convention which cannot be restricted—either allowing free use or in the form of non-voluntary licenses—except in cases which are strictly defined by the Convention.

It has never been questioned—and on the basis of the text of the relevant provisions of the Convention it could not be questioned seriously—that reprographic reproduction (photocopying, etc.) is a form of reproduction which is covered by the said exclusive right. Therefore, the question is not what rights authors should have at the international level in respect of reprographic reproduction of their works, as if there were no clear and fairly detailed provisions about this in the Convention; what should be discussed is only how these provisions can be applied.

110. The Berne Convention contains basic provisions on the right of reproduction in its Article 9(1), which reads as follows: "Authors of literary and artistic works protected by this Convention shall have the exclusive right of authorizing the reproduction of these works, in any manner or form." The general rule of possible limitations of this exclusive right is contained in Article 9(2) which reads as follows: "It shall be a matter for legislation in the countries of the Union to permit the reproduction of such works in certain special cases, provided that such reproduction does not conflict with a normal exploitation of the work and does not unreasonably prejudice the legitimate interests of the author."

111. The report of the 1967 Stockholm Diplomatic Conference which adopted Article 9 stresses that the two conditions indicated in Article 9(2) should be considered separately, step by step. If reproduction would conflict with a normal exploitation of the works concerned, reproduction is not permitted at all (that is the case, e.g., in respect of photocopying certain material, such as sheet music). Even if a relatively large number of photocopies are made—for internal purposes—in industrial undertakings, it may not conflict with the normal exploitation of the work but it may unreasonably prejudice the legitimate interests of authors. Such a prejudice, as the report makes clear, may be—and if it may be, it should be—eliminated or, at least, mitigated by means of an equitable remuneration.

112. After the above reference to the legal situation under the Berne Convention, in the following part, a description is given of how the copyright problems of reprography have been tackled at the national level and, particularly, what kind of role collective administration plays in various national systems. Those countries have been chosen for this purpose where legal developments have produced certain typical solutions.

113. First, the example of the Federal Republic of Germany is mentioned because it was as early as

in the 1965 Copyright Act that the legislation of this country contained fairly detailed provisions on the right of reproduction and on its limitations. Those provisions, although they did not refer directly to reprography, were also meant to be applied to such reproduction.

114. The legislators had taken into account a decision of 1955 of the Federal Court of Justice on photocopying which concerned the reproduction of articles from scientific journals by an industrial firm for the use by its experts. The Federal Court of Justice found that this activity served the commercial objectives of the firm and, therefore, it was not a free use according to the notion of private use, but an infringement of copyright. This decision led to the conclusion of a contract between the Federation of German Industry (Bundesverband der deutschen Industrie) and the Association of the German Book Trade (Börsenverein des deutschen Buchhandels) on photocopying from periodicals for internal use by firms. The firms undertook to pay remuneration in the case of periodicals published not earlier than three years before being copied.

115. The 1965 Copyright Act permitted single copies of a work to be made for personal use, without the obligation to pay any remuneration. It was also permissible to make or cause to be made single copies of a work for one's own scientific use, for its inclusion in internal files and also for other internal uses with respect to small parts from published works or single articles published in newspapers or periodicals and to works which were out of print and where the copyright owner could not be traced (if the copyright owner could be traced and the work was out of print for more than three years, he was allowed to refuse his consent to such reproduction only for a valid reason). The Copyright Act also provided that if the reproduction was for commercial purposes, an equitable remuneration was due to the author.

116. On the basis of the above-quoted provisions, the copyright collecting societies of the Federal Republic of Germany concluded a series of licensing agreements. For example, in 1982, the general literary rights society WORT concluded an agreement with the ministers of culture of the provinces (*Länder*) concerning the reprographic reproduction of protected works in schools for an annual lump sum. In order to distribute those sums, surveys were made in selected schools. WORT has also collected substantial amounts under agreements concerning copying for commercial purposes. The remuneration so collected was divided equally between publishers and authors. The authors' portion was transferred to authors' associations and used for general welfare purposes.

117. The Copyright Amendment Act of June 24, 1985, has made several changes in this system. Under the new Act, it is permissible to make or to cause to be made copies of small parts of a printed work or of individual contributions published in newspapers for personal use, and for teaching in non-commercial institutions of education, in a quantity required for one school class or for State examinations in schools, universities and non-commercial institutions of education. In three cases, an absolute prohibition has been imposed on reprographic reproduction without the author's consent, namely in respect of whole books or whole periodicals, graphic recordings of musical works (sheet music) and computer programs.

118. The most significant change is, however, that a statutory license has been introduced for all cases where the authors' consent is not needed for reproduction. The legislators found that, since 1965, technological development had led to private copying on a scale that such copying unreasonably prejudiced the legitimate interests of authors and that this prejudice should be eliminated or, at least, mitigated by means of provisions on an equitable remuneration for such use. Therefore, the statutory license system also covers private copying.

119. The new legislation differentiates between domestic and non-domestic reproduction. It has been taken into account that, for the time being, only few copying machines are available in private households and are less frequently used for copying of protected works than the machines functioning in libraries, educational institutions and similar places where protected works to be copied are available to a qualitatively larger extent. Therefore, a hybrid levy system has been introduced. One of the elements of the system is an equipment levy to be paid by the manufacturer or importer (defined by the law between 75 DM and 600 DM depending on the capacity of the machines). This levy has to be paid for every machine irrespective of whether it is used in domestic or non-domestic context as a lump-sum payment corresponding to the amount of copyright material normally copied by means of such machines. The fact that in non-domestic situations (in schools, universities, public libraries, copy-shops, etc.) protected works are reproduced to a greater extent is taken into account by an operator levy to be paid in addition to the equipment levy (0.05 DM is charged for each A4 page from a school book and 0.02 DM for an A4 page from other works).

120. The amount of the operator levy is determined on the basis of a sampling method: it is established how large the percentage of the photo-

copies of protected works is in relation to all photocopies made in selected institutions that are representative of their area, and these data are used when charging remuneration for photocopying in a comparable institution. The law provides that the right to photocopying levy can only be exercised through a collecting society.

121. Although this system may seem to be simple, it has proved to be difficult to calculate the amount of copying for which fees have to be paid. Therefore, WORT has chosen to conclude various agreements with organizations of operators of copying machines in which lump-sum payments have been agreed upon. The lump-sum payments are based on statistical surveys reflecting the extent and structure of reprographic reproduction of protected works.

122. WORT, after the deduction of the administration costs, distributes to the authors 70% of the fees in case of works of fiction, and 50% of the fees in case of scientific works; the rest is distributed to publishers. If, however, the contract between the author and the publisher provides for different distribution rate, they have to redistribute the payment between each other.

123. The example of the Netherlands, which was also among the first countries to legislate on reprography, underlines how important a well-functioning collective administration system is for an appropriate solution in this field.

124. The first provisions on reprography were introduced in the years 1972–1974 but did not touch the limitation of the right of reproduction according to which, as a general rule, the reproduction of a few copies for private use was free. The Copyright Act is even more generous towards government offices, libraries, educational institutions and other institutions representing public interests. Those institutions are allowed to make more than a few copies for their own internal use. Finally, commercial organizations and institutions may also make more than a few copies, in other words “as many copies as are reasonably necessary.” All these mass copiers, however, are obliged to pay an equitable remuneration. The remuneration to be paid by the government, libraries, educational institutions and other public interest institutions has been fixed at 0.025 guilder per copy of a page from a scientific publication and 0.10 guilder per copy of a page from a non-scientific publication. Libraries, however, may make single copies of articles for users and for interlibrary loans with no liability to pay such a remuneration.

125. Foundation REPRORECHT, the Dutch collecting society representing authors and publishers—which had been set up to collect photocopying remunerations—had difficulties in fulfilling this task for a fairly long time because it did not have any special status under the law and its membership was not wide enough. Therefore, copiers refused to deal with REPRORECHT; only the government paid some nominal sums to the society to keep alive the system it had set up itself.

126. Finally, a new Royal Decree was needed to get out of this deadlock. Under the Decree of August 23, 1985, reprography remuneration has to be paid to the collecting society appointed by the Minister of Justice with the exclusion of any other society and even of the owners of rights themselves. On February 19, 1986, REPRORECHT was appointed as the exclusive collecting society.

127. In the copyright laws of the Nordic countries, it is just the strong, institutionalized legal position of collecting societies which is the most typical feature of the regulation dealing with reprographic reproduction.

128. The Nordic copyright laws all recognize the exclusive right of authors to control their works in respect of making copies thereof and making them available to the public. The limitation for “private use” can be found equally in all these laws. Works which have been disseminated to the public may be reproduced in “single copies” (“a few copies”) for such use.

129. Special provisions exist in the Nordic countries in favor of libraries and archives to make copies for their own purposes (such as conservation of their collections, copying for loaning books or documents because of their fragility or rarity, etc.). It is also permitted for such institutions to make a single copy of an article appearing in a composite work or in a periodical or newspaper or of parts extracted from other published works for borrowers engaged in studies or scientific research (instead of lending the original volumes).

130. The most typical feature of the Nordic copyright laws concerning reprography is the so-called “extended collective license” system which applies to the agreements concluded between collecting societies and the competent state and municipal authorities governing photocopying in schools and at universities. Under that system, teachers and professors of schools and universities which have received authorization from an association representing a large number of national authors of a certain category of works also have the right to copy

published works of the same category, the authors of which (including foreign authors) are not represented by the association. Non-member authors whose works are thus reproduced are, as regards, for example, remuneration, treated in the same way as the members of the contracting organization. Furthermore, they have generally—for instance, if the contracting organization decides to use the remuneration for collective purposes—a right to claim individual remuneration for the reproduction of their works. For non-members, there is a kind of compulsory licensing element in this system. This is, however, only a conditional element because there are also other guarantees to safeguard the rights of authors outside the organization. For example, in Sweden, no reproduction can be made under the agreement if the author has filed a prohibition against such reproduction with any of the contracting parties. There are also provisions in the laws for possible cases where users and the collecting organization are unable to reach agreement. In such cases an arbitration system—in Sweden, a special mediation system—is applied.

131. The agreements impose several limitations on photocopying which, in addition to the upper limits of the number of copies and of the extent of the portions to be copied from various types of works, etc., prohibit the reproduction of certain publications which are especially vulnerable from the point of view of photocopying (it being in conflict with the normal exploitation of such works), such as sheet music, exercise books, answer books and other one-time use publications.

132. In respect of the methods of determining the remuneration as well as of its collection and distribution, there are some differences between the various Nordic systems. In general, sampling methods are applied, but in Denmark a separate solution has been adopted: the users have to indicate, in their reports, the title of the work, the names of the author and the publisher as well as the year of the publication; furthermore, they have to produce one surplus copy on which the number of copies made is to be marked on the first page.

133. The differences in distribution systems are particularly significant. Only COPYDAN, the Danish collecting organization, distributes the remuneration to individual authors and publishers on the basis of the above-mentioned detailed information. In the other countries, the remuneration is transferred to the associations representing authors and publishers more or less according to the proportion of the actual reproduction of the categories of works concerned and such moneys are used for certain collective purposes (grants, subsidies, etc.).

134. If the system of the Nordic countries offers good examples of how collective administration organizations may work with legislative support and with some semi-compulsory elements insofar as owners of rights outside the collecting organizations are concerned, the example of the United States of America shows that entirely private schemes based on exclusive rights are also workable.

135. The 1976 Copyright Act of the United States of America contains various provisions limiting the right of reproduction in respect of reprography (fair use for purposes such as teaching, scholarship or research, free photocopying by libraries and archives in certain cases which, however, must not amount to the related or concerted reproduction of multiple copies of the same material or to systematic reproduction or distribution).

136. Although the 1976 Copyright Act limits the right of reproduction under the provisions mentioned above, the exclusive right to authorize reproduction still prevails as a general rule. The individual exercise of the rights concerned is, however, generally impossible; only their collective administration may be workable and efficient. In the United States of America, the Copyright Clearance Center (CCC) has been set up in order to take care of the administration of such reprographic reproduction rights.

137. CCC was set up following a recommendation by the Congress that a practical clearance and licensing mechanism be developed, with the support of various bodies representing authors and other right holders. The goal of CCC was to ensure that the publishers of scientific, technical and medical journals receive compensation for each copy reproduced by colleges, universities, libraries, private corporations, etc. CCC represents, on a non-exclusive basis, in addition to the right holders of journals, also those of magazines, newsletters, books and newspapers. There are almost one million titles now registered with CCC.

138. The original system for collection and distribution was the following: publishers established photocopying fees which were printed in journals, and it was also stated that copies could be made—for personal or internal use—if the indicated fees were paid to CCC. Each user had to keep a record of photocopies or send in a copy of the first page of each article indicating the number of copies made. CCC billed users on the basis of those records and copies which were sent in. After the deduction of handling charges, the fees were forwarded to the individual publishers, who then distributed a certain part of the fee to their authors in accordance with their contractual agreements.

139. This system (the so-called Transactional Reporting Service) was found to be too burdensome for certain users. Therefore, CCC has introduced an additional plan, the Annual Authorization Service. The licenses granted in the framework of that service are based upon industry-wide statistical coefficients that estimate copying levels of various classes of employees. The copying coefficients are derived from 60-day surveys of photocopying conducted at sample locations for each licensee. The copying coefficients are used to estimate total annual copying for each licensee taking into account their "employee population." Distribution to right holders is based upon the survey information.

140. A specific feature of the collective administration of rights by CCC is that each publisher establishes his own fees for the licensing of the photocopying of his works. Therefore, the licenses offered by CCC are not real blanket licenses with unified license fees, but actually a collectively administered system of individualized licenses. CCC only deducts administrative expenses and distributes fees to the publishers who then distribute them to their authors in accordance with their contractual arrangements.

141. The Copyright, Designs and Patents Act 1988 of the United Kingdom has introduced some new legal solutions having also taken into account the satisfactory contractual arrangements of the Copyright Licensing Agency (CLA) representing authors and publishers.

142. The new Act provides for certain precisely determined free uses for libraries and archives and in respect of photocopying by educational establishments of passages from published works. Reprographic copies of passages from published literary, dramatic or musical works, to the extent determined in the Act, can be made by or on behalf of an educational establishment for the purposes of instruction without infringing any copyright in the work, or in the typographical arrangement. Not more than one per cent of any work may be copied by, or on behalf of, any establishment in any quarter of a year. What is important, however, is that such copying is not authorized if licenses (practically, a collective administration scheme) are available authorizing the copying in question and the person making the copies knew, or ought to have been aware of, that fact. The Secretary of State is empowered to take further measures to guarantee educational needs. If, after considering any representations, he is satisfied that the refusal by an individual copyright owner to join an existing scheme is unreasonable, he may issue an order that the owner

should be treated as if he were a member of that scheme; such orders would be subject to appeal. Following a recommendation to that effect by an inquiry ordered by him, the Secretary of State may issue an order providing for non-voluntary licensing in respect of a particular class of works.

143. The fairly detailed presentation, above, of various national laws and collective administration systems shows that appropriate and practical ways and means can be applied to meet obligations under the international copyright conventions without creating unreasonable obstacles to photocopying by various users, and particularly that collective administration of rights is a workable and efficient solution in this field.

144. There is one point, however, where further steps are needed. It is essential that national treatment should be fully applied in this field, and foreign copyright owners should enjoy the same rights as national ones. From this viewpoint, it is extremely important that the collective administration organizations dealing with such rights—the so-called reproduction rights organizations (RROs)—conclude reciprocal representation agreements and that they grant equal treatment to the owners of rights represented by foreign societies. So far, such agreements have been established only in a relatively narrow circle. In this field, however, there is a hope for positive developments because the International Federation of Reproduction Rights Organisations (IFRRO)—which until 1988 was known as the International Forum of such organizations—has become much more active recently in promoting bilateral agreements among such organizations.

145. The reproduction rights organizations administer the rights of both authors and publishers. Various solutions can be found in national laws, in collective administration agreements, and in individual contracts concerning the participation of publishers in the remuneration received for photocopying. However, the end result is practically the same: authors and publishers share the photocopying remuneration between themselves.

146. In general, it is the author who is indicated as the owner of the right, which is normal because photocopying is covered by the right of reproduction. Authors then can—and fairly frequently do—transfer their reprographic reproduction rights, with the stipulation that they receive a certain percentage from such payments collected by the publishers. Some contracts, however, are silent about the entitlement to such remuneration. In such cases, it is useful if national legislation contains

some guidance about the distribution of the amounts between authors and publishers. (In countries where under the law the employers are the original owners of rights in works created by their employee authors, the legal status of such works is, of course, "simpler.")

147. Furthermore, what is copied is not the work in general, but a specific published edition of the work. If users do not use published editions but replace them by photocopies, this conflicts not only with the authors' rights and interests, but also with the acquired rights and the interests of the publishers. The interests of the authors and publishers are, however, not always the same. For example, the authors of scientific works may be interested in as wide and as free a use as possible of their works, an attitude which, from the viewpoint of publishers, may be disastrous and may lead—and, according to the information received from interested international non-governmental organizations, frequently does lead—to the bankruptcy and disappearance of certain scientific journals. (This latter outcome then is detrimental also to the scholars because they lose a forum for publication of their works.) Those considerations—and, particularly, the aim of better protection of publishers against piracy—have led certain legislators to recognize a separate neighboring right of publishers (in the so-called typographical arrangements). All that makes it even more desirable that reprographic rights organizations administer the rights of both authors and publishers.

148. The importance of reproduction rights organizations is further increased by the ever more widespread storage in, and retrieval from, computer systems of works including electrocopying (copying of a work published in a machine-readable medium, optical recording, "downloading" from data bases, etc.). This new form of using protected works—where machine-readable material is disseminated through information and telecommunication systems and where hard copy reproductions can be made by adequate terminals—is very complex and is still in the formative stages of development. It seems, however, fairly certain that the existence of appropriate collective administration systems is even more indispensable than in the case of photocopying.

149. The collective administration organizations dealing with the rights concerned by photocopying and electrocopying, in many cases, also administer certain other rights in writings. One such right is the public lending right, that is, the right to receive remuneration for the public lending of books, etc. The legal nature of such a right is, however, fairly controversial; it has been questioned whether this

right belongs to the field of copyright and neighboring rights or if it is rather a general, cultural or social right. For this reason, this report, which concentrates on the typical cases of collective administration of copyright and neighboring rights, does not cover the administration of the public lending right.

G. Collective administration of the rights of performers and phonogram producers

150. The further two fields (namely, the fields of cable retransmission of broadcast programs and home taping), where new typical forms of collective administration have been developed concern not only copyright but also the so-called neighboring rights. Therefore, first, the special problems concerning collective administration of those rights are discussed.

151. Some basic rights that are recognized by the Rome Convention and by national laws for the owners of the so-called neighboring rights (the rights of performers, producers of phonograms and broadcasting organizations) can be, and actually are, exercised on an individual basis without the need for specific collective administration schemes (although, e.g. the conditions of employment contracts of performers are very frequently the subject of collective negotiations between unions representing them and the representatives of their employers). There is, however, one area of neighboring rights where collective administration is indispensable, namely, the rights of performers and phonogram producers with regard to the broadcasting and communication to the public of phonograms.

152. Article 12 of the Rome Convention provides as follows: "If a phonogram published for commercial purposes, or a reproduction of such phonogram, is used directly for broadcasting or for any communication to the public, a single equitable remuneration shall be paid by the user to the performers, or to the producers of the phonograms, or to both. Domestic law may, in the absence of agreement between these parties, lay down the conditions as to the sharing of this remuneration." (The rights provided for in Article 12 of the Rome Convention are sometimes referred to as "Article 12 rights.") Under Article 16 of the Convention, however, Contracting States may make various reservations; *inter alia*, they may declare that they do not apply Article 12 or may make its application depending on reciprocity.

153. As to the question of whether this provision also covers cable transmission—and in respect of

the legal consequences—, see the following subchapter on collective administration of copyright and neighboring rights concerned by cable retransmission of broadcast programs.

154. Article 12 of the Rome Convention does not provide for an exclusive right in respect of broadcasting and communication to the public but only a right to equitable remuneration (that is, what is involved is a kind of non-voluntary license). Countries party to the Convention are, however, free to grant exclusive rights in this field. Certain countries (e.g., Brazil, Costa Rica, Guatemala and the United Kingdom) have granted phonogram producers the right to authorize or prohibit the broadcasting and/or public performance of their phonograms (in that respect, it also should be noted that in some countries, e.g., in the United Kingdom, the rights of producers of phonograms are considered to belong to copyright in a wider meaning of that word). In the majority of countries, however, only a right to equitable remuneration is granted to performers and/or phonogram producers for such uses.

155. Under Article 12 of the Rome Convention, Contracting States are free to grant such rights to performers alone, to producers of phonograms alone or to both, or to grant such rights to one of the two categories only, with the obligation to share with the other. Both categories are entitled to such a right to equitable remuneration, e.g., in Barbados, Brazil, Costa Rica, Czechoslovakia, Denmark, Finland, Italy, Norway, Paraguay, Sweden and Uruguay. Furthermore, in Austria, Colombia and Germany (Federal Republic of), the right is granted to one of the beneficiaries with the obligation to give a share to the other beneficiary. Performers alone are entitled to such a right in, e.g., Chile, Ecuador, El Salvador and Peru and producers of phonograms alone are entitled to it, e.g., in Fiji, Guatemala, Ireland, Philippines and the United Kingdom. In certain countries, such as Ireland and the United Kingdom, the beneficiaries enjoying the right have agreed voluntarily to share the remuneration with the other category of beneficiaries. In Spain, phonogram producers enjoy an exclusive right to authorize any kind of communication to the public of their phonograms, and performers have the right to receive an amount equal to 50% of the fees collected by the phonogram producers for such a use.

156. As far as the shares of the two categories of beneficiaries are concerned, the WIPO/ILO/Unesco Model Law concerning Protection of Performers, Producers of Phonograms and Broadcasting Organizations adopted in 1974 suggests that, unless otherwise agreed between performers and

producers, half of the amount received by producers should be paid to performers. In general, the shares of the two categories are equal, but there are some exceptions. In those European countries that grant a right only to one category of beneficiaries, an agreement between FIM, FIA and IFPI applies according to which the entitled category gives the other a share of one-third of the revenue received for the broadcasting of phonograms. In some countries, such a voluntary sharing is based on a national agreement between the organizations of performers and those of phonogram producers.

157. The right to remuneration or the exclusive right of performers and producers of phonograms in respect of broadcasting and communication to the public of their performances recorded on phonograms or their phonograms, respectively, is, from a practical point of view, of a nature that is similar to the one of the so-called performing rights of composers and text-writers discussed in subchapter B above. It follows from this fact that this right of performers and producers also can only be exercised through an appropriate collective administration scheme.

158. In the majority of countries where such a right is recognized, performers and producers of phonograms have established joint collective administration organizations (e.g., LSG in Austria, SOCINPRO in Brazil, GRAMEX in Denmark, Finnish GRAMEX in Finland and GVL in the Federal Republic of Germany). In certain other countries, the two categories of beneficiaries have separate organizations (e.g., OSVU in Czechoslovakia, SAMI in Sweden for performers, PPL in the United Kingdom and IFPI national groups in other countries).

159. Collective administration organizations dealing with neighboring rights are, frequently, under the same State control as the musical performing rights organizations. They negotiate contracts with users, and their tariffs, in certain countries, have to be approved by the competent authorities. In other countries, the competent authorities and special tribunals only interfere in case of dispute, particularly if what is involved is the possible abuse of the *de facto* monopoly position of such organizations.

160. As far as the collection of the remuneration for the communication to the public of phonograms is concerned, the organizations of performers and producers of phonograms, in certain countries, have not established their own monitoring and collecting services, but entrust the performing rights organizations of authors with doing this job. An

appropriate commission fee has to be paid for those services but that fee is still considered to be generally lower than the costs would be in case of establishing a new monitoring and collection system. Such a solution is applied, to more or less extent, e.g., in Austria, Colombia, Czechoslovakia, Denmark, Germany (Federal Republic of), Hungary, Italy and Spain. On the other hand, as far as the collection of the remuneration for broadcasting of phonograms is concerned, this task is carried out by the performers' and producers' organizations themselves. The administrative costs of organizations representing performers' and phonogram producers' rights do not usually exceed 10-15%.

161. The methods of distribution of the remuneration among performers and among producers differ from country to country. In respect of broadcasting of phonograms, the remuneration is usually distributed to individual right owners (performers and producers of phonograms); while in respect of communication to the public, individual distribution to performers is less frequent, and a smaller or bigger part of the remuneration, or its entirety, is used for cultural and social purposes (as far as phonogram producers are concerned, individual distribution also prevails in this field). When the revenue from the public performance of phonograms is distributed to individual right owners, the distribution is usually based on the same scheme as the one applied for the distribution of the revenue arising from the broadcasting of phonograms.

162. The fact that it is difficult to obtain satisfactory data on the repertoire used is not the only reason for not distributing the remuneration to individual performers. The other reason which is stressed by the representatives of performers' organizations fairly frequently is that the repeated and uncontrolled uses of recorded performances have detrimental effects on the employment opportunities for performers and the remuneration is considered to be a compensation for this.

163. There exists an international cooperation between collective administration organizations based on the joint activities of three international non-governmental organizations, the International Federation of Musicians (FIM), the International Federation of Actors (FIA) and the International Federation of the Phonographic Industry (IFPI).

164. Foreign performers and producers of phonograms are entitled to receive their share from the distribution of the remuneration under Article 12 of the Rome Convention in keeping with the principle of national treatment or, where applicable, to the extent of material reciprocity. However, in

respect of performers, this entitlement of foreign right owners only prevails to a limited extent, for two main reasons.

165. The first reason is that the network of appropriate collective administration organizations and bilateral agreements between such organizations has not been fully established yet, although FIM, FIA and IFPI and the collective administration organizations work actively to promote wider and closer cooperation between national organizations.

166. The second reason why, in many cases, foreign performers do not receive the share to which they are entitled is that certain jointly adopted principles of FIM and FIA accept—and in a way promote—the conclusion of bilateral agreements under which no payments are transferred between the contracting organizations; all the income remains in the country where it is collected and is used in accordance with the rules of the organization of that country (it is either used for social or cultural purposes or is distributed to the performers of the country in order to compensate them for the remuneration they are entitled to in other countries but do not receive). This is the so-called category B agreement which is more frequently used than the so-called category A agreement under which the shares due to performers of the other country are transferred in one sum and the distribution is completed by the organization of that country according to its own distribution schemes. However, even in the case of category A agreements, the non-identifiable shares (and their percentage is fairly high) remain in the country where they are collected and are used for social or cultural purposes for the benefit of performers.

167. As far as the arguments in favor of this system are concerned, mainly the problems of identification and the related high costs, on the one hand, and the need for mutual solidarity among performers, on the other, are cited.

168. It is also mentioned sometimes that category B agreements, in relation with developing countries—whose balance of payments is fairly negative in this field—may facilitate the adherence of those countries to the Rome Convention and may contribute to the improvement of the legal and economic position of their performers.

H. Collective administration of rights concerned by cable transmission of broadcast programs

169. There are two basic types of cable programs. The first type of programs are the cable-originated

programs; that is, programs initiated by the cable operators themselves. The second type of cable programs are the simultaneous and unchanged transmissions of broadcast programs. It is in the field of the second type of cable programs that certain legal and practical problems emerge which, in principle, can only be solved either by means of non-voluntary licenses or by means of a specific collective administration scheme.

170. In respect of authors' rights, simultaneous and unchanged transmission of broadcast works is covered by Article 11^{bis}(1)(ii) of the Berne Convention, under which "[a]uthors...enjoy the exclusive right of authorizing...any communication to the public by wire...of the broadcast of the work, when this communication is made by an organization other than the original one." It is clear under this provision that such a right exists in all cases where an organization other than the original broadcaster transmits the broadcast program simultaneously and without change. In such cases, however, under Article 11^{bis}(2), non-voluntary licenses may replace the exclusive right of authorization. (In respect of cable-originated programs, the general provisions on communication to the public prevail, where non-voluntary licenses are not allowed.)

171. The Rome Convention provides for rights of the beneficiaries of the so-called neighboring rights only in respect of cable-originated programs which are covered by the general concept of direct communication to the public, but not in respect of cable retransmissions of broadcast programs. However, national laws may, and in certain countries do, grant some rights (at least a right to remuneration) to the beneficiaries of neighboring rights also for such retransmissions.

172. The original broadcasters of programs are generally in the position to obtain authorization for their programs from the owners of copyright and the so-called neighboring rights in due time. The cable operators who transmit broadcast programs simultaneously—and frequently, not only one program—cannot obtain authorizations in the same way. Although, in respect of certain categories of works, authors' organizations were ready to offer appropriate blanket licenses, other categories of works, particularly audiovisual works, were not covered by such licensing schemes. In addition, the rights of original broadcasters and other neighboring rights also had to be taken into account.

173. In that situation, various governments and legislators came to the conclusion that the operation of cable systems can only be guaranteed by means of non-voluntary licenses. Such licenses

have been introduced, e.g. in Austria, Denmark and—in respect of certain programs—in the United States of America.

174. However, the owners of copyright and neighboring rights—through their national organizations and through the international non-governmental organizations grouping such national organizations—have proved that non-voluntary licenses do not represent the only solution; they do not represent the optimum solution either; there is another workable option which better corresponds to the basic principles of the protection of copyright and neighboring rights; and that option is the collective administration of such rights.

175. At the end of the 1970s, CISAC initiated joint actions of the interested international non-governmental organizations. After a number of negotiations, CISAC, the International Federation of Film Producers Associations (FIAPF) and the European Broadcasting Union (EBU) adopted a joint declaration in October 1979 on the basic principles of a future collective administration system. Then, those organizations, on the one hand, and the International Alliance for Distribution by Cable (AID), on the other, worked out a model contract for the same purpose in December 1981.

176. It was recognized that such a scheme could only be implemented in practice if an important link in the chain of collective administration systems which was still missing was established. The link which was missing was an appropriate collective administration network for the rights in audiovisual works. The right holders in such works—although on the basis of differing legal solutions—are generally the producers. Producers, however, did not have collective administration organizations.

177. The way towards a workable collective administration of rights concerned by cable retransmissions of broadcast programs was opened by the establishment, in December 1981, of the Association for the International Collective Management of Audiovisual Works (AGICOA). The members of the Association are national associations and societies of producers of audiovisual works for management and/or collection of fees in respect of such works and the Association has essentially two main tasks: negotiations (in cooperation with its national member organizations) in respect of cable retransmission of audiovisual works in its repertoire, and the distribution to right holders of the sums obtained on their behalf by the competent national collecting societies.

178. The first contract concerning the authorization of cable retransmission of programs on the basis of a global collective administration system covering all rights involved was concluded in Belgium between SABAM (the authors' organization which already had a restricted collective administration agreement with cable operators in respect of its own repertoire), AGICOA with its Belgian member organization (BELFTEL) and the broadcasting organizations concerned (individually represented), on the one hand, and the Professional Union of Radio and Teledistribution, on the other.

179. Under the contract, cable operators pay a lump sum for the use of the repertoire represented by the right owners' organizations, and the latter undertake guarantees against possible third party claims. After various rounds of negotiations, the following agreement was reached in 1985 on the distribution rates: broadcasting organizations: 43.25%, AGICOA: 35.25%, SABAM: 21.50%. As from January 1, 1989, the following distribution applies: broadcasting organizations: 43%, AGICOA: 35%, SABAM: 22%.

180. After the success in Belgium, there was a breakthrough also in the Netherlands where a national model contract was concluded—and later applied—between BUMA (an authors' organization), AGICOA with its Dutch member organization (SEKAM) and the broadcasting organizations concerned, on the one hand, and VECAL, the organization of private cable distributors, and VNG, the organization of public cable distributors, on the other. Here, the following distribution rates have been agreed upon: broadcasting organizations: 44.5%, AGICOA: 33.5%, BUMA: 22%. In the Federal Republic of Germany also, contracts have been concluded recently between the interested right owners and the Deutsche Bundespost for the cable retransmission of broadcast programs, where right owners have been represented by GEMA.

181. As far as the distribution of fees within the three categories is concerned, in the case of broadcasting organizations, it did not raise any practical problems because of their limited number. The authors' organizations had already their established distribution system which they could also use for this purpose, although there is a need to extend and adapt that system to certain categories of authors (scriptwriters, film directors, etc.). AGICOA, however, had to establish its own system. Such a system—with a computer network and an international register of titles—started functioning as early as in 1984.

1. Collective administration of rights concerned by home taping

182. In respect of reprographic reproduction, it has been already discussed (see paragraphs 110 and 111 above) that reproduction of works for private purposes is not recognized by Article 9(2) of the Berne Convention as a case where exceptions to the right of reproduction would be allowed without any further conditions. Any exception can only be allowed if the conditions set out in that provision of the Convention are met; namely if the exception only concerns a specific case, does not conflict with a normal exploitation of the works concerned and does not unreasonably prejudice the legitimate interests of authors.

183. Studies have proved, beyond any reasonable doubts, that widespread domestic reproduction of sound recordings for private purposes (home taping) does seriously prejudice the legitimate interests of authors. In respect of the widespread domestic reproduction of audiovisual works for private purposes, similar, although less evident and therefore more disputed, prejudices have been identified.

184. As discussed above, in respect of reprographic reproduction, any reproduction which causes such a prejudice cannot be allowed under the national laws of countries party to the Berne Convention unless the prejudice is eliminated, or at least mitigated so as to render it reasonable, by an appropriate compensation.

185. It was the Federal Republic of Germany which, for the first time, introduced such a compensation in 1965. The second country, Austria, followed suit in 1980, the third, Hungary, in 1982, and since then several other countries have taken more or less similar steps (Congo, France, Iceland, Norway, Portugal, Spain and Sweden) or have prepared draft laws to that effect.

186. The Rome Convention does not contain such obligations concerning home taping in respect of neighboring rights as the Berne Convention does in respect of copyright. It is, however, generally considered to be justified to extend this right to remuneration also to performers and phonogram producers who suffer similar prejudices.

187. The countries which have introduced or are about to introduce a home taping royalty have, in general, recognized that such a royalty is justified in respect of both audio and video recordings. As far as the medium on which the royalty is payable is concerned, the Copyright Law of the Federal

Republic of Germany introduced royalties on hardware, that is, on recording equipment in 1965; in 1985, however, the royalty was extended to recording media (blank tapes). Iceland, Portugal and Spain have introduced a royalty on both hardware and recording media, while other countries (Congo, Finland, France and Hungary) restricted its application to recording media.

188. The obligation to pay the royalty is imposed on the manufacturers and importers of recording equipment and/or recording media. Certain equipment and media are, however, exempt from the obligation (exported items, equipment and tapes intended for use for professional purposes or which (such as dictaphones) are unlikely to be used for recording protected material). The amount of the royalty is determined by the law itself or is left, under certain conditions, to an arbitration type forum; it is either a flat fee or a percentage of the price.

189. The collection is made either by a special collecting organization established for that purpose or by an existing performing rights organization which then transfers the shares to the organizations representing the various other categories of owners of rights. It is fairly frequent, however, that the law itself provides that a certain percentage of the royalties must be used for cultural and social funds.

190. Some typical examples of the distribution of home taping royalties are given in the following paragraphs.

191. In Austria, in the case of audio recordings, the distribution rates are the following: 56% to authors (of which AUSTRO-MECHANA administering musical mechanical rights receives 49% and LITER-MECHANA dealing with literary mechanical rights receives 7%), 20% to performers (through LSG and OSTIG) 17% to producers of phonograms (through LSG) and 7% to broadcasters (as copyright owners or producers of phonograms). In the case of video recordings, the distribution is made on the basis of similar principles, and partly through the same collective administration organizations, but there the organizations representing the producers of cinematographic works (VAM) and broadcasters (VG Rundfunk) also receive a fairly high percentage (22.8% and 25.8%, respectively). The Law, however, contains a provision under which the collective administration organizations have to pay the greater part of the remuneration (that is, more than 50%) to their social welfare schemes. Therefore, actually, less than 50% of the remuneration may be distributed to individual owners of rights.

192. In Finland, two-thirds of the remuneration has to be used for the promotion of national culture, mainly through investment in Finnish phonogram production and through financial contribution to antipiracy activities. From the remaining one-third of the revenues from blank audio tapes, authors receive 49%, performers 25.5% and producers of phonograms also 25.5%.

193. In France, from the revenues from audio tapes, 50% goes to authors and music publishers, 25% to performers and also 25% to producers of phonograms, while the revenues from video tapes are divided into three equal parts among authors, performers and producers of audiovisual works. The collecting societies acting on behalf of the various categories of owners of rights are, however, obliged to use 25% of the remuneration for cultural purposes.

194. In the Federal Republic of Germany, from the audio remuneration, performers receive 27% and producers of phonograms 15% (both categories represented by GVL), while authors receive 58% (of which GEMA, the musical performing and mechanical rights society, receives 42%, and WORT, the literary rights society, receives 16%). In respect of video remunerations, the shares of GVL, GEMA and WORT are 21%, 21% and 8%, respectively, and 50% goes to the organizations of film producers and film authors.

195. In Hungary, from the audio tape royalties, 50% is paid to authors and distributed by ARTIS-JUS, 30% is paid to performers which has to be used for social purposes and 20% is paid to the phonogram industry, while, from the video tape revenues, authors and other copyright owners (producers of audiovisual works) receive 70% and performers receive 30%.

196. In Sweden, the levy on audio and video tapes is considered to be a tax, from the amount of which only a relatively small percentage is used for the compensation for the prejudice suffered by copyright and neighboring right owners by home taping. Two-thirds of the entire sum is used by the government for unspecified purposes (as other taxes are); of the remaining one-third, 80% is set aside for a cultural fund and only 20% is distributed among owners of rights. From the 20% of the one-third of the revenues, authors (STIM) receive 40%, while performers (SAMI) and producers (IFPI Group, NIFF) receive 30%-30%. No individual right owners have, however, a right to receive a part of these revenues. Norway has a similar system.

197. The national laws that have introduced a royalty for home taping provide that claims to such a royalty may only be made through collective administration organizations. It follows from the very nature of this right to remuneration that it cannot be administered individually.

198. The distribution of home taping royalties by the competent collective administration organizations is made by means of one of the most widespread techniques used also by the musical performing rights organizations, namely by means of sampling. This technique contains an element of "rough justice" but it still guarantees a fairly correct distribution to individual owners of rights reflecting essentially the actual use of the works protected.

199. Various studies have proved that, in the case of audio home taping, the two main—almost exclusive—sources of recordings are records and radio broadcasts. On the basis of broadcasting logs, record sales figures and other available data, the actual structure of home taping can be identified and the royalties can be distributed to individual owners of rights with practically the same precision as in the case of certain categories of traditional performing rights royalties and with fairly low expenses. In the case of video recordings where copying is mainly made from television programs but where also tape-to-tape copying exists, the identification of the works most frequently used is somewhat more difficult but, with an adequate sampling technique, still a fairly correct "rough justice" can be obtained.

200. The distribution of home taping royalties, in general, is fairly cost-effective because the organizations dealing with it also administer certain other rights and the sampling methods, and, thus, also the actual distribution, can be easily connected to existing distribution schemes.

201. Although certain attempts have been made recently to try to offer some kind of legal theories for avoiding the application of national treatment in respect of home taping royalties (which may undoubtedly involve, for the time being, some unilateral burdens in international relations), it can hardly be denied that the right to remuneration for home taping is a right which belongs to the rights of authors in their literary and artistic works and the rights of the beneficiaries of neighboring rights in their protected productions. Therefore, it can hardly be denied either that the granting of national treatment to foreigners is an obligation of countries party to the Berne Convention and the Rome Convention.

202. From the point of view of national treatment, also the legal obligation, or the actual practice, in some countries, to use an extensive part of the revenues collected on the basis of such a right for social and cultural purposes—and, thus, only in favor of national owners of rights—raises some questions. A specific legal situation exists, in this field, e.g., in France, where the Law of July 3, 1985 provides in its Article 28, that "the right to remuneration ... shall be shared amongst the authors, performers, producers of phonograms and videograms *in respect of phonograms and videograms fixed for the first time in France*" (emphasis added). It is, however, added to this provision that it is "subject to the international conventions," that is, if the international conventions (particularly the Berne Convention and the Rome Convention) provide otherwise the provisions of those conventions must be applied.

IV. Recent WIPO Activities Concerning Collective Administration of Copyright and Neighboring Rights

203. The growing importance of collective administration as a "third way" between individual exercise of exclusive rights and non-voluntary licenses has been first recognized by different bodies of WIPO and Unesco dealing with new problems of copyright emerging with new technologies.

204. The Subcommittees of the Executive Committee of the Berne Union and the Intergovernmental Committee of the Universal Copyright Convention dealing with copyright questions raised by reprographic reproduction, in Washington in June 1975, studied different methods of control and remuneration suggested by a previous working group (such as contractual schemes, non-voluntary licenses, levies on equipment) but in the short resolution—beside the statement that it was up to each country to resolve that problem by adopting any appropriate measures in keeping with the international conventions—they drew attention to one of them only. They emphasized that, in countries where reprographic reproduction was widespread, governments should consider, among other measures, encouraging the establishment of collective systems to administer the rights involved.

205. The WIPO/Unesco Group of Experts on Unauthorized Private Copying of Recordings, Broadcasts and Printed Matter, in Geneva in June 1984, confirmed the need for collective administration regarding all sorts of private reproduction. A number of participants underlined that non-voluntary license schemes may be applied only if the

system of collective agreements cannot be introduced. It was stated that, in the case of home taping, a certain right to remuneration should be recognized and it should be administered collectively.

206. The second session of the WIPO/Unesco Committee of Governmental Experts on Copyright Problems Arising from the Use of Computers for Access to or the Creation of Works, at its June 1982 meeting in Paris, drew up similar recommendations regarding the rights concerned by storage in, and retrieval from, computer systems of protected works. The recommendations adopted by the Committee emphasized that such a use of works should be based upon contractual agreements or other freely negotiated licenses arranged either individually or collectively. However, it was stated in the discussion that, because of rapid technological development, the exercise of authors' rights on an individual basis became extremely complex in that field and that the real alternative to the introduction of non-voluntary licenses was collective administration of rights.

207. Much attention was paid to collective administration in the "Annotated Principles of Protection of Authors, Performers, Producers of Phonograms and Broadcasting Organizations in Connection with Distribution of Programs by Cable" adopted by the meeting of the Subcommittees of the Executive Committee of the Berne Union and the Intergovernmental Committees of the Universal Copyright Convention and of the Rome Convention in Geneva in December 1983, and approved subsequently by the three Committees. The Annotated Principles emphasized that the clearance of the rights through program-by-program negotiations with every owner of rights concerned was impracticable and, in such cases, authorization should be effected by means of collective administration. Various principles dealt with the details and necessary guarantees of such administration.

208. The WIPO/Unesco Group of Experts on the Rental of Phonograms and Videograms, in Paris in November 1984, stated, in the conclusions adopted by it, that "the soliciting and granting of licenses may, specially where the number of right holders is great, require legislative measures which facilitate the negotiations of licenses and their implementation measures preferably resulting in the collective administration of the rights." There was, however, a fairly strong opposition at the meeting against the idea of making the enjoyment of the rental right dependent on the participation by the right owners in a collective administration scheme (which was proposed as an alternative principle in the working documents). The report of the meeting reflects,

inter alia, the following: "Representatives of film producers and several other participants said that, with regard to the special conditions of producing and marketing cinematographic works, the film industry needs control over each form of using its productions, and the rental or lending of videograms should be exempted from collective administration of the rights therein. In their view, the film industry is in a position to control the rental or lending of each videogram individually.... Some experts felt that the authors cannot be obliged to entrust a society with the administration of their rights" and "expressed their concern that the system of collective administration may easily become a kind of non-voluntary licensing, in particular with regard to authors and producers who did not entrust the society giving collective authorization to represent them."

209. Partly in parallel with the above-mentioned meetings dealing with the various new uses emerging with the new technologies, there was another joint WIPO/Unesco program item which concerned collective administration. The Committee of Governmental Experts on the Drafting of Model Statutes for Institutions Administering Authors' Rights in Developing Countries met twice, in Paris in June 1980 and in Geneva in October 1983, and, at its second session, adopted two Model Statutes for organizations administering authors' rights; one for public institutions and one for private societies. It followed from the very nature of the terms of reference of the Committee that it had to concentrate mainly on the organization, structure and legal status of collective administration and it undertook no analysis of the substantive questions of collective administration.

210. In the field of neighboring rights, it was the Subcommittee of the Intergovernmental Committee of the Rome Convention which, in Geneva in January-February 1979, discussed, in detail, the questions of collective administration of such rights. The Subcommittee adopted a Recommendation which contained a subchapter on the "Guidelines for the establishment and operation of collective societies for Article 12 rights."

211. Since 1985, in WIPO's programs, even more attention has been devoted to the questions of collective administration than before, and attention has been given to the more substantive and more general questions relating to such administration of rights.

212. During the period from October 1985-February 1986, seven comprehensive studies were published in WIPO's monthly reviews *Copyright* and *Le Droit d'auteur* under the joint title: "Collective

Administration of Authors' Rights." The following subjects were covered by the following authors (in the order of the publication of the articles): "Collective Administration of Authors' Rights in the Developing Countries" by Mr. Salah Abada, "Development and Objectives of Collective Administration of Authors' Rights" by Dr. Mihály Ficsor, "Music Performing Rights Organizations in the United States of America: Special Characteristics; Restraints; and Public Attitudes" by Professor John M. Kernochan, "Collective Administration: The Relationship Between Authors' Organizations and Users of Works" by Mr. Michael Freegard, "Technical Problems in Collective Administration of Authors' Rights" by Mr. Ulrich Uchtenhagen, "The Relations Between Authors and Organizations Administering Their Rights" by Professor Gunnar Karnell and "Collective Administration and Competition Law" by Mr. Jean-Loup Tournier and Mr. Claude Joubert.

213. The publication of the series of articles was part of the preparation of the WIPO International Forum on the Collective Administration of Copyrights and Neighboring Rights which was held in Geneva in May 1986. The Forum was attended by some 160 participants (government representatives, observers from intergovernmental organizations and international non-governmental organizations as well as members of the general public (in general, representatives and members of various national collective administration organizations)).

214. In his opening address, Dr. Arpad Bogsch, Director General of WIPO, indicated the purpose of the Forum as follows: "With galloping technological developments, collective administration of such rights is becoming an ever more important way of exercising copyright and neighboring rights. Taking into account its increasing importance, much more attention should be paid to it, both at the national and at the international levels. Guarantees should be worked out and applied for the correct functioning of collective administration systems, to make sure that they will not lead to a disguised version of non-voluntary licensing or to the unjustified collectivization of rights."

215. During the three days of the Forum, 21 invited speakers presented their papers. They were mainly the representatives of international non-governmental organizations grouping collective administration organizations (CISAC, FIM, FIA, IFPI, IPA, EBU) and of national collective organizations from all parts of the world: Africa, the Americas, Asia, Australia and the Pacific, and Europe; from both developed countries and developing countries and from both market-economy

countries and planned-economy countries. The presentation of the various papers was followed by discussions open to all participants.

216. At the end of the Forum, the participants adopted a Declaration in which they, *inter alia*, expressed the view that "the establishment of collective administration systems should be encouraged wherever individual licensing is not practicable and as a preferable alternative to non-voluntary licenses, even where such licenses could be admitted under the Berne Convention ... and the Rome Convention." The Declaration stated that the participants would welcome it "if WIPO were to continue to make governments and the concerned interested circles increasingly aware of the importance of appropriate systems of collective administration of copyrights and neighboring rights and were to stimulate further international discussion in this field." They considered desirable that "WIPO collect, study and make available to governments and the concerned interested circles information" on various aspects of collective administration of copyright and neighboring rights and that it "continue to pay particular attention to rendering assistance in the setting up or strengthening of collective administration systems in developing countries."

217. The study of the legal and practical aspects of collective administration continued in the same program period (1986-87) when WIPO, together with Unesco, concentrated its program on the copyright and neighboring rights questions related to various categories of works. The results of the discussions on nine categories of works by a series of meetings of committees of governmental experts were then finalized by the Committee of Governmental Experts on the Evaluation and Synthesis of Principles on Various Categories of Works, in Geneva in June-July 1988. A number of principles—accompanied by detailed comments—were worked out which were not considered to be binding but were intended to offer guidance to governments and legislators when dealing with the questions concerned.

218. The categories of works in connection with which the questions of collective administration were discussed were the following: audiovisual works, phonograms, dramatic and choreographic works, musical works, and works under the heading "the printed word." The very principles regarding collective administration, however, relate more specifically to the following issues: home taping of audiovisual works and phonograms, rental of such productions, cable distribution of such productions, performing rights relating to musical works

and the non-theatrical use of excerpts from dramatic-musical works ("small rights"), facsimile reproduction of writings or graphic works (reprography) and storage in and retrieval from computer systems of such works.

219. At the end of the meeting of the Committee of Governmental Experts on the Evaluation and Synthesis of Principles on Various Categories of Works, it was stated that the results of the discussions on the principles would be taken into account by WIPO in the future work on the model provisions for national legislation in the field of copyright.

220. In conformity with those statements, the Draft Model Provisions referred to above prepared by the International Bureau of WIPO for the Committee of Experts on Model Provisions for Legislation in the Field of Copyright, with comments on the various provisions, contain a chapter (Chapter VIII) on "Collective Administration of Economic Rights." The first session of the Committee was held in Geneva in February-March 1989 and it also discussed Chapter VIII. Chapter VIII of the Model Provisions, along with the comments on them, and the corresponding part of the report of the session are annexed to this report.

221. The second session of the Committee will be held in Geneva in November 1989. Under the Program and Budget of WIPO for 1990-91, the Committee will hold, at least, one more session in 1990; the Model Provisions will be finalized after that, and published under the name and responsibility of the International Bureau of WIPO.

222. It should be noted that the draft Model Provisions only contain the most general provisions that may be necessary at the national level and it is emphasized that in various aspects, national laws may, and should, contain more detailed provisions depending on the different legal, economic, cultural and social conditions prevailing in the countries concerned. That is particularly true in respect of collective administration. Therefore, the finalization and publication of the Model Provisions will not make the continuation of the study on the legal and practical aspects of collective administration unnecessary.

V. Certain Basic Questions of Collective Administration of Copyright and Neighboring Rights

A. *Introductory remarks*

223. The description above of the main fields of collective administration of copyright and neigh-

boring rights indicates that there are important differences between those fields in respect of forms, methods and actual effects of such administration. Therefore, before dealing with certain general substantive questions, it should be noted that there are various types of collective administration and, thus, it should always be clarified which types are involved and what significance they may have in relation to the questions discussed.

224. It seems sufficient to indicate the great variety of collective administration schemes by referring to the various types of collective administration from some basic viewpoints.

(1) From the viewpoint of the level of collectivization:

(a) Collective representation, individualized authorization, direct distribution (mainly in the field of dramatic rights but, in certain cases, also in the field of reprography).

(b) Full collective administration, blanket licensing, distribution among right owners with certain "corrections" (musical performing rights).

(c) Collective enforcement of rights, blanket licensing, no distribution among individual right owners (certain organizations administering reprographic reproduction rights and performers' rights, respectively, follow that way).

(2) From the viewpoint of the right owners' freedom of choice between individual and collective ways of administration:

(a) Right owners can choose freely (at least there is no legal obligation to choose collective administration, even if they may, in practice, have no other choice).

(b) The law subjects the exercise of rights to the condition of collective administration (for example, in the case of home taping).

(c) The law also determines the only organization through which the rights can be administered in a collective way.

(3) From the viewpoint of the scope of rights and right owners covered by collective administration:

(a) The collective administration organization may only administer its members' rights.

(b) In the field determined by the law, the organization administers the rights of non-members too (extended collective administration), but they may renounce such administration under certain conditions.

(c) Extended collective administration without the possibility of renouncing it.

(4) From the viewpoint of the freedom of the collective administration organization to set tariffs and other conditions of licenses for users:

(a) Free negotiations; in case of dispute, a court decides.

(b) There are negotiations between the organization and the users but any agreement can only be applied if a supervisory administrative body (for example, the Ministry of Culture) approves it.

(c) The tariffs and other conditions are fixed by legal provisions.

225. With the examples referred to in the preceding paragraph, the "typology" of collective administration is far from being exhausted. They are, however, sufficient to illustrate that, when a reference is made to collective administration, it may mean ways and forms of such administration which differ in many important aspects. If, e.g., from the various types of administration mentioned above, a (1)(a)-(2)(a)-(3)(a)-(4)(a) variant is taken, it is fairly obvious that what emerges is really an appropriate way of administering exclusive rights. At the same time, a (1)(c)-(2)(c)-(3)(c)-(4)(c) variant is only a very small step away from a non-voluntary license system. Actually, there is a need for a fairly great amount of benevolence for speaking even about that small step. Such schemes can be accepted, without serious doubts, only in cases where the minimum rules of the Berne Convention, the Rome Convention and national laws do not provide for unrestricted exclusive rights and, thus, such a restrictive form of exercising rights may be considered to be allowed.

226. Therefore, when, in this chapter, an attempt is made to give answers to some basic substantive questions of collective administration—or at least to outline the fields where further studies are needed—it is always taken into account whether what is involved is a right that under the Berne Convention or the Rome Convention is recognized as an exclusive right or is a right which under the same conventions may be reduced to a mere right to remuneration.

B. Which are the types of works and types of uses for the administration of which right owners should be represented by a collective administration organization?

227. In Chapter III, the collective administration of the following rights, and in respect of the following types of uses, has been discussed in detail: per-

forming rights (or "small rights," that is, the right of public performance, the right of broadcasting and the right of communication to the public by other means) in musical works; mechanical rights (that is, the right to authorize sound recording), basically in musical works; the right of public performance in dramatic and dramatico-musical works; the *droit de suite* in works of fine art; the right of reproduction in respect of reprographic reproduction of literary and graphic works and the rights concerned by the storage in, and retrieval from, computer systems of works (including "electrocopying"); the so-called Article 12 rights (that is, the right of broadcasting and the right of communication to the public by other means of phonograms, and of performances included in phonograms); the right of communication to the public by cable of broadcast programs and the right of reproduction in respect of home taping of works included in phonograms and of audiovisual works.

228. The reasons for collective administration of rights are common in certain respects, but do differ in other respects, in the above-mentioned cases.

229. In the case of performing rights, reprographic reproduction rights and the rights concerned by simultaneous and unchanged retransmission of broadcast programs, collective administration is an indispensable means of the exercise of the exclusive rights to authorize the uses concerned and, in a way, collective administration is the condition for maintaining those rights as exclusive rights, as the only workable alternative to non-voluntary licenses. The number and circumstances of uses and the number and variety of works used make it, practically, impossible for the users to identify the right owners in due time, ask for their authorization, negotiate their remuneration and other conditions of the use and to pay the fees, on an individual basis. It is also, from a practical point of view, impossible for right owners to monitor all such uses.

230. The operation of collective administration organizations has proved, beyond any doubt, that such a system can replace non-voluntary licenses—even in such complex cases as simultaneous and unchanged retransmissions of broadcast programs—without creating any unreasonable obstacles to the access to the rights needed by users and without prejudicing any justified interests that have to be taken into account in regulating the protection of copyright and neighboring rights.

231. Collective administration is, however, also needed in the majority of cases where non-volun-

tary licenses are applied, or, in other words—without going into discussions on the legal nature of the rights concerned—a mere right to remuneration is recognized, namely, in those cases where mass uses are involved or where it is otherwise particularly difficult to monitor the uses. It is under such conditions that reprographic reproduction rights, the so-called “Article 12” neighboring rights and the rights concerned by simultaneous and unchanged cable retransmission of broadcast programs are administered in countries where those rights are restricted to a right to remuneration (although, as indicated above, the example of other countries shows that collective administration could be an appropriate alternative to non-voluntary licenses). A further example is the collective administration of the right to remuneration in respect of home taping.

232. There are certain exclusive rights (such as the so-called mechanical rights and the right of public performance in dramatic and dramatico-musical works), as well as certain rights to remuneration (such as the *droit de suite*) in respect of which collective administration does not seem to be an absolute necessity (experience shows that those rights, although with some difficulties, may also be exercised on an individual basis), but still such administration may facilitate their exercise and is in the interest of both the right owners and the users.

233. Some elements of collective administration of rights (such as negotiations on collective agreements with users and collective collection of fees) may and do exist, in certain cases, even where the rights concerned could be fully and relatively easily exercised by the individual owners of rights. In such cases, the consideration (which of course, is—more or less—always present in respect of collective administration) that authors and other right owners are stronger in their relation with users if they are united, seems to be decisive. (The joining of forces in negotiations with users may, however, have some consequences in the field of the application of antitrust laws, which is discussed in subchapter I below.)

234. It should also be taken into account that, although collective administration, in certain cases, is indispensable and, in other cases, facilitates the exercise of copyright and neighboring rights, it is not justified to extend its application to fields where its advantages are not significant. Exclusive rights may, in such fields, prevail to the fullest extent if they are exercised by the owners of rights individually; when such exercise is possible, it is advisable to preserve it as much as possible.

C. *Should there be different collective administration organizations for the administration of different rights and of the rights of different right owners?*

235. The description of the main types of collective administration of copyright and neighboring rights, in Chapter III above, clearly indicates that the practice of collective administration organizations has given an affirmative answer to this question. There are various organizations that administer different rights or, although they administer only one category of rights, they do so for the benefit of different categories of owners. However, a further question is, in which cases and to what extent is such a cumulation of administration of rights justified.

236. The majority of the strongest and oldest collective administration organizations—the musical performing rights societies—do represent not only the rights of authors, but also those of publishers, and the same is generally true in respect of reprographic reproduction rights organizations. Publishers are admitted as members of such organizations and, sometimes, they play a decisive role in their governing bodies.

237. The alliance between composers and text-writers, on the one hand, and music publishers, on the other, is traditional. It should not be forgotten that in 1847, when Henrion, Parizot and Bourget started the famous lawsuit, referred to in paragraph 23 above, they enjoyed the full support of their publisher, Jules Colombier, and without him, their chance for victory would have been meager. Publishers are managers and patrons of their composers and their interests are in harmony—at least, in general. Therefore, it was quite understandable that they joined forces and tried to enforce their rights and represent their interests in the framework of the same societies.

238. However, it should not be forgotten either that publishers are businessmen also; they cannot neglect such factors as income and profit. There is also an increasing tendency for certain users (particularly in the phonogram and television industries) to acquire control of publishing companies. It is, therefore, undeniable that certain conflicts of interests may emerge between publishers and authors (e.g., when negotiating contractual stipulations or determining authors' and publishers' shares in the distribution rules).

239. Authors should be protected against the possibility that economically stronger users may abuse their position. In several countries, legal provisions regulate some basic conditions of contracts protect-

ing authors by means of minimum rules. In other countries, publishers can get only restricted licenses for precisely determined uses of works. In such countries, publishers are not admitted as ordinary members of authors' societies. (It is another matter that, in international relations, certain publishers' and subpublishers' rights prevail and are administered by authors' societies.)

240. Nevertheless, it is not necessarily against the interests of authors, if publishers are admitted as members and even if they are allowed to play an active role in the governing bodies of the collective administration organizations. Experience shows that appropriate methods can be found and applied to avoid abuse of dominant positions and, as a result, authors and publishers can work together harmoniously and efficiently in the joint administration of their rights. This seems to be an important lesson which can be drawn from the example of the administration of musical performing rights, and it has also been reconfirmed by the experience of the reproduction rights organizations.

241. The structure and operation of certain reproduction rights organizations, however, also refer to another characteristic feature, namely, to the fact that some of those organizations represent a special kind of "coalition." Such "coalition" organizations only fulfill those tasks of collective administration which, in practice, can only be fulfilled by one single organization (such as monitoring uses, collecting fees); the actual distribution of fees is done by the member organizations of such "coalition" organizations, such as societies of authors and organizations of publishers.

242. The "coalition"-type forms of collective administration clearly dominate in the case of certain rights, such as the "Article 12" neighboring rights, the rights concerned by simultaneous and unchanged retransmission of broadcast programs and the rights concerned by home taping. The monitoring of uses and the collection of remuneration is done either by a joint organization set up for this purpose or by one of the member organizations in the "coalition" which—in that respect—represents the others. In both cases, each member organization receives its share from the collected money (a share which is generally agreed upon as a result of intensive and difficult negotiations), and they distribute it to individual owners of rights or use it for common (social or other professional) purposes.

243. So far, those cases have been analyzed where the need for a joint organization, or a "coalition" of various categories of right owners follows from the very nature of the uses involved. Another

possible basis for combining the administration of rights is that, although the rights are related to different kinds of uses, they concern the same category of works, and, consequently, the same categories of right owners. This is the case, e.g. in respect of performing rights and mechanical rights in musical works which, sometimes, are administered by separate organizations but very frequently by the same organization. In the case of other categories of works, it is fairly general that the same organization administers all rights in the category of works concerned.

244. In some countries, as indicated in paragraph 37 above, there are collective administration organizations—in general, public or semi-public ones—which administer practically all categories of rights, or, at least, many of them, irrespective of whether they are connected by the nature of the uses, the works concerned or the person of the right owners, or not.

245. It is obviously hard to offer generally applicable answers to the question, which solution is better: to set up separate organizations for the administration of different rights owned by different owners or to entrust one global organization with the administration of different rights.

246. What seems here the most important element is that all categories of right owners whose rights can only be administered in a collective way should have an appropriate organization to represent them. It is easier to avoid the subordination of the interests of certain groups to those of others if all groups of owners of rights form separate societies. At the same time, that multiplicity does not exclude coordinated actions wherever they have joint interests that can be asserted more successfully if they join their forces.

247. There are, however, arguments also in favor of concentrating collective administration in one single big organization. Under the present circumstances, where ever more new uses emerge with new technologies, it seems easier to administer the various interconnected rights by one organization. It is true that, in organizations assembling several or all kinds of rights, the reconciliation of internal conflicts needs much more care and tact, but the experience of certain traditional societies shows that appropriate methods and guarantees can be found to tackle that problem. At the same time, comprehensive copyright organizations have better chances when negotiating with users and also at the level of formulating national copyright policy. Such organizations represent a more significant and concentrated force in legislative battles and they can

offer more attractive alternatives if collective administration comes up as opposed to non-voluntary licenses.

248. On the basis of the various considerations mentioned above, it can only be decided, country by country, and case by case, which of the outlined solutions would be the best one. E.g., in certain developing countries that are in the stage of establishing their copyright infrastructure and cannot afford several organizations for collective administration, a centralized, global organization may seem to be appropriate.

D. Should there be one or several collective administration organizations for the same category of rights in each country?

249. As the description of the main fields of collective administration, in Chapter III, indicates, in the overwhelming majority of cases, a certain category of rights is administered by one single collective administration. The exceptions to this rule are very rare (see, e.g., the cases mentioned in paragraph 35 above).

250. In respect of determined categories of rights, many of the basic advantages of collective administration (easy and legally safe licensing of uses, possibility for the authorization of the use of the entire world repertoire in one single license, substantial decrease of administrative costs, etc.) can be obtained only by means of one single organization. Therefore, it seems advisable to avoid parallelism and rather to establish only one organization for each category of rights.

251. It is another matter that the lack of alternative organizations may create a *de facto* monopoly position for the organizations concerned. That aspect is dealt with in subchapter I.

E. Should public or private organizations administer copyright and neighboring rights?

252. This is a question which cannot be answered in general terms. Much depends on the political, economic, cultural, social and legal circumstances in which the collective administration has to be organized. Furthermore—as in many other fields—tradition is an important factor here too.

253. In market-economy countries, private organizations dominate (however, some of them have a semi-governmental character, others function with

government participation, and still others work under fairly close supervision by public authorities). In planned-economy countries, public institutions are in the majority, but some of them are of a rather “mixed” nature with author-dominated governing bodies. In developing countries, both private societies and public institutions can be found. As indicated in paragraph 37 above, it is mainly in Africa that public organizations are fairly frequent.

254. Those who are of the view that, in developing countries—at least, in those where the copyright infrastructure is still in a relatively early stage of development—, public law entities are the most suitable formula, usually refer to the special conditions prevailing there. In such countries, sometimes, the number of authors is relatively small and they do not have sufficient income to undertake the initial expenses needed for the establishment of a collective administration organization; therefore, government contribution is necessary. Furthermore, it is fairly frequent that the most important users (such as the national radio or television) are also public institutions with strong government support, in relation to which a public collective administration organization may have a better chance to negotiate and enforce the payment of appropriate fees than a private organization.

255. In general, however, private organizations seem to better suit the nature of the rights to be administered—which are normally the private rights of individual right owners—as well as the very purpose of collective administration of such rights.

256. At the same time, it should be seen that neither the private element nor the public one is exclusive, in practice, in the great majority of cases. The activities of private societies are supervised by public authorities—which is discussed in subchapter H below—or fairly frequently, they even have semi-public characteristics. And the public nature of an organization does not necessarily mean that right owners are unable to take part or even have a decisive role in the collective administration of their rights.

257. In this respect, two acceptable alternatives seem to exist. The first and basic alternative is the collective administration of rights by private organizations, and the second alternative, which may be justified under specific conditions in certain countries, is the collective administration by a public organization but with appropriate guarantees for the right owners’ ability to influence the way in which their rights are administered.

F. In which cases is it justified to provide, in legislation, that a right may only be exercised through a collective administration organization?

258. In Chapter III above, reference is made to some cases where the exercise on certain rights has been made conditional on collective administration. Those cases concern the *droit de suite* (see paragraphs 96 and 101), the reprographic reproduction rights (see paragraphs 120 and 126) and the rights concerned by home taping (see paragraph 197).

259. Collective administration is an important way of exercising rights. In certain cases, it is the only workable alternative to non-voluntary licenses, and sometimes—as, e.g., in the case of home taping—the only manner in which certain rights to remuneration can be exercised. Still, it is undeniable that through collective administration, an exclusive right cannot as fully prevail as when it is exercised individually by the right owners themselves. A provision providing for obligatory collective administration of a right is to be seen as a condition under which the right may be exercised, a kind of restriction, although less restrictive than a non-voluntary license (this is, of course, only true if the collective administration system is regulated and operated properly and does not become a disguised form of non-voluntary licenses).

260. For the above-mentioned reasons, the prescription of obligatory collective administration schemes should be avoided wherever it is possible and the availability of individual exercise of rights should be maintained.

261. The Berne Convention provides for cases where it is a matter for legislation in the countries of the Berne Union to determine the “conditions” under which certain rights may be exercised (see Article 11^{bis}(2) and Article 13(1)). In general, those provisions are considered as a possible legal basis for the introduction of non-voluntary licenses, because they define the bottom line of the possible conditions in providing that those conditions must not, under any circumstances, be prejudicial to the authors’ rights to obtain an equitable remuneration. This does not mean, however, that non-voluntary licenses can be considered as the only possible “conditions” referred to in the provisions mentioned; also other conditions—practical restrictions—of the exercise of exclusive rights concerned can apply. Obligatory collective administration of rights seems to be such a condition. Because the possibility of providing for such conditions is determined (in an exhaustive way) in the Convention, it seems that obligatory collective administration

may only be prescribed in the same cases as non-voluntary licenses.

262. The above statement should, however, not be interpreted to mean that obligatory collective administration may be introduced only in the cases where the text of the Berne Convention uses the expression “determine the conditions” under which the rights may be exercised. Such obligatory collective administration is permissible also in cases where a right is established as a mere right to remuneration (as in the case of the *droit de suite*) or where the restriction of an exclusive right to a mere right to remuneration is allowed on the basis of some other wording (as is the case of Article 9(2) concerning the right of reproduction).

263. The latter example—the possibility of restricting the right of reproduction, in certain special cases, to a right to remuneration—shows how strictly and seriously the limits applying to such restrictions should be taken. As indicated in paragraph 111 above, it is just in respect of photocopying that the report of 1967 Stockholm Diplomatic Conference makes it clear that, in certain cases, photocopying may be allowed without authorization but against an equitable remuneration. The conditions for such a special case of non-voluntary licenses, however, are extremely important. As the text of Article 9(2) of the Convention and the relevant part of the report state, no such solution is allowed if it conflicts with a normal exploitation of the works concerned or otherwise unreasonably prejudices the legitimate interests of authors [and other right owners]. In certain cases of reprographic reproduction, such conflict and/or prejudice can clearly be identified (e.g., the reproduction of certain works, such as computer programs, musical works in sheet music form, exercise books, etc., and the systematic reproduction of works). In such cases, no non-voluntary licenses should be allowed and the prescription of obligatory collective administration is not justified either.

G. In which cases, and under what conditions, may a collective administration organization administer rights in respect of which the right owner have not given power to the organization to represent them?

264. One of the most important elements of fully developed collective administration systems is the possibility that collective administration organizations may grant blanket licenses to users for the use of the entire world repertoire of works concerned by the right thus administered. Actually, if blanket licenses could not be applied, the advantages of

collective administration would be very limited or, in certain cases, even eliminated.

265. However, even where the system of bilateral agreements is fairly developed (such as in the case of musical performing rights), the repertoire of works in respect of which a collective administration organization has the power to administer a certain exclusive right is, practically, never an entire world repertoire (because, in certain countries, there are no appropriate partner organizations to conclude a reciprocal representation agreement, or because certain authors withhold their works from the collective administration system).

266. In many cases, the whole system of collective administration would be undermined if collective administration organizations would not be allowed to grant blanket licenses and would be obliged to identify, work by work, and right owner by right owner, their actual repertoire and, what would be even worse, to prove the legal basis on which they are authorized to administer the rights in respect of individual works and individual right owners. Therefore, if there exists an organization which represents a sufficiently wide repertoire of works (actually, all the works which are available for collective administration under reasonable legal and practical conditions) in respect of which a certain right can only be administered collectively, such an organization should be guaranteed the possibility of granting blanket licenses.

267. There are two basic legal techniques of guaranteeing the operation of blanket license systems.

268. The first legal technique involves the following elements: the lawfulness of authorizing the use of works not belonging to the organization's repertoire is recognized by law (either in legislation governing the activities of such organizations or by case law) and warranted by certain guarantees, such as proper supervision of the activities of the organization. At the same time, the organization must guarantee that individual right owners will not claim anything from the users to which a blanket license is granted or, if they still do, that such claims will be settled by the organization, and, that any user will be indemnified for any disturbance or expense caused to him by the owner of rights in the contested work. And, finally, the organization also has to guarantee that it would treat the authors who have delegated their rights to the organization in the same way as those who have not (which should also mean that a "dissident" author cannot raise unreasonable claims).

269. Such a legal solution should necessarily include a fundamental condition of the appropriate

operation of a blanket license system, namely: there should be a legal presumption that the organization has the power to administer the right in every work covered by the blanket license and to represent the owner of the right in legal proceedings.

270. The other legal technique for guaranteeing the conditions for blanket licenses is what is called the system of extended collective administration clauses. An example of such a system is referred to in paragraph 130 above. The essence of this solution is that, if there is an organization which represents a large number of authors of a certain category which authorizes the uses concerned, the users can also use all the other works belonging to the same category, without authorization but against the payment of the same fees, and under the same conditions as the ones prevailing in the case of works covered by the authorization.

271. For non-members, certain guarantees may—and in the case referred to in paragraph 130 above do—exist (the possibility for express prohibition of the use of their works, the right to claim individual remuneration, etc.), but such a system necessarily contains an element of non-voluntary licensing and, therefore, it seems to be allowed, under the Berne Convention and the Rome Convention, only in cases where non-voluntary licenses are allowed (see, in this respect, the previous subchapter).

H. What kind of government supervision may be justified concerning the establishment and operation of collective administration organizations and their relationship with the right owners represented by them?

272. As discussed in various contexts above, the overwhelming majority of collective administration organizations are in a *de facto* monopoly position and such a position is, in practical terms, a necessary condition for the appropriate operation of collective administration schemes. The *de facto* monopoly position, in general, prevails in respect of both the right owners and the users. Without appropriate guarantees, such a monopoly position might be abused. In this subchapter, those guarantees are discussed which seem to be necessary concerning the establishment and operation of collective administration organizations and their relationship with right owners. The guarantees that may be needed in respect of the relationship of such organizations with users are discussed in the following subchapter.

273. Although, in certain cases, right owners have a theoretical possibility to choose individual

exercise of rights, or to be represented by an alternative organization, such options can hardly be realized in practice. The fact is that in the typical fields of collective administration, right owners, as a rule, do not have any realistic choice other than entrusting the administration of their rights to a collective administration organization which is in a *de facto* monopoly position in the country concerned.

274. If such an organization does not operate properly, such a situation may lead to neglecting, or to the practical denial or restriction of, the rights of certain right owners. Therefore, under the present circumstances, wherever more rights are administered by collective administration organizations, it seems to be justified to introduce and apply appropriate legal provisions to guarantee the proper operation of collective administration systems. This seems, in fact, to be an obligation of countries party to the Berne Convention and/or the Rome Convention (in the same way as they are obliged to take appropriate measures against other possible violations of rights which are to be protected under those conventions).

275. Some countries legislated on the conditions of establishment and operation of collective administration organizations already a relatively long time ago (such as the Federal Republic of Germany in 1965). However, it has become more general only recently that specific—fairly detailed—provisions on collective administration have been included in various national laws (see e.g. the Law of July 3, 1985 in France or the Law on Intellectual Property of November 11, 1987 in Spain). In some other countries where private organizations exist, still the general provisions in civil law and administrative law apply as regards the supervision of such organizations.

276. The special provisions on collective administration of copyright and neighboring rights, in general, make the establishment of a collective administration organization conditional on the approval by a competent authority (e.g., the Ministry of Culture, the Ministry of Justice or the Patent Office). In France, the courts may decide on the incorporation of the societies but on the basis of the opinion and possible suggestions of the Ministry responsible for culture. In deciding on the approval of the establishment of a collective administration organization such factors are taken into account as the suitability of the articles of association of the organization to guarantee appropriate administration, the reliability of the persons entitled to represent the organization; the availability of the necessary repertoire and of economic means, etc.

277. The approval of the establishment of a collective administration organization, of course, is not a sufficient guarantee in itself for the appropriate operation of the collective administration system. Therefore, the competent authorities, although they should not unnecessarily interfere in the actual administration of rights, should regularly supervise certain key elements of the collective administration systems, such as whether the actual activities correspond to the approved articles of association; whether the rules of collecting and distributing fees are correct; whether the costs of administration are reasonable; and whether the distribution and transfer of fees actually take place as prescribed.

278. The supervision of the establishment and operation of collective administration organizations should guarantee, *inter alia*, the following: the availability of the collective administration system for all right owners who need it; reasonable terms of membership; an appropriate role of the right owners, or of bodies representing them, in important decisions that may concern the administration of their rights; a correct monitoring, collection and distribution system which does not contain any elements of discrimination between right owners, members or non-members, nationals or foreigners; the availability of concrete and detailed information for the right owners and for the foreign organizations with which mutual representation contracts exist in respect of certain basic data on the administration of the rights in their works or in their repertoire, respectively.

279. If a collective administration organization no longer complies with the conditions determined when authorization was granted to it to operate, the competent authority should apply appropriate measures and, as a last resort, the authorization should be withdrawn. The national laws containing special provisions on collective administration organizations do contain provisions to this effect. The role of the supervisory authorities is similar here to the one prevailing in respect of the approval of the operation of the organizations.

280. In countries where public organizations deal with the collective administration of rights, the establishment of such organizations, of course, presupposes the adoption of appropriate statutes which, as a rule, also provide for the conditions and supervision of the operation of the organizations. All that has been discussed in respect of the purpose of supervision and the necessary conditions of operation of private organizations, *mutatis mutandis*, applies to the relevant aspects of the supervision and operation of public organizations.

I. What kind of government supervision may be justified for the prevention of possible abuses of the *de facto* monopoly position of collective administration organizations (particularly, in respect of tariffs and other licensing conditions)?

281. It follows from the very notion of exclusive rights that the owner of such a right is free to decide about the use of his work and, *inter alia*, free to determine the fees to be paid for, and the conditions of, every use. In general, there is no reason and no legal basis whatsoever for restricting this right of an individual owner of rights. The laws of offer and demand settle the possible conflicts; it is in the interest of the right owner that his work be used widely and as frequently as possible; if he sets unreasonable fees and conditions the users may not conclude contracts with him but with somebody else.

282. If exclusive rights are administered collectively, this way of administration, generally, should not influence the exclusive nature of such rights. This is so because, after all, the laws of offer and demand also prevail in such cases. If the tariffs and conditions are set in an unreasonable way, the optimum number of uses cannot be guaranteed; therefore, the organization, in general, is constrained not to set such fees and conditions.

283. In certain cases, however, the possibility does exist, that a collective administration organization being in a *de facto* monopoly position may abuse that position. Three main cases of such abuses may exist, at least in theory. The first case is the denial of licensing certain uses without any valid reason. The second case is the unreasonable discrimination between users who belong to the same category. The third case of possible abuses may consist of the setting of tariffs and other licensing conditions in an arbitrary way. In the first two cases, the abuse is fairly clear, in the third one it is, however, difficult to determine what fees and conditions follow from the normal and reasonable exercise of exclusive rights and which ones are to be considered arbitrary.

284. Although it is difficult to define what is a reasonable tariff for a license, certain principles and general practice have been developed in respect of the various categories of rights which are administered collectively. There are, e.g., two basic forms of tariffs, namely, a percentage of the receipts which the use of the works concerned provides (which is mainly applied when the use of protected works relates to the main activity of users, such as in the case of theater performances, concerts, publication of protected works, etc.) or a lump-sum pay-

ment (which is more typical in respect of uses not belonging to the users' principal activity but being rather of a secondary nature). In respect of tariffs expressed in percentages, international practice has produced certain fairly generally accepted standards (such as, e.g., the "10% rule" which, however, should not be considered applicable everywhere—in the case of certain "grand rights," the percentage is higher—or, e.g., the percentages determined in the BIEM/IFPI standard contract referred to in paragraph 71 above). The lump sum is determined on the basis of many specific factors which differ from country to country, but still, here too, there are some fairly generally accepted principles of calculation (although in certain fields—such as in the field of reprographic reproduction—there is a more significant diversity in arriving at the amount of such a payment).

285. It is evident that if a tariff or condition corresponds to the internationally accepted standards or does not differ from such standards to a substantial extent, it can hardly be alleged that, in applying such a tariff or condition, there is an abuse of the *de facto* monopoly position. If, however, in a certain country, the tariffs are higher than in other countries, this does not indicate in itself that any abuse has been made of the monopoly position of the collective administration organizations. All the circumstances should be thoroughly considered and it is quite possible that, in the country concerned, the tariffs are far from too high, on the contrary, the tariffs are too low in the other countries.

286. The supervision of the tariffs and other licensing conditions of collective administration organizations may take three forms: the settlement of possible disputes by ordinary civil courts; the existence of special tribunals or other arbitration bodies for such purposes and the approval of the tariffs and other licensing conditions by an administrative authority.

287. Of the three main forms of supervision, it is obviously the first one which suits, to the fullest extent, the exclusive nature of rights administered. The usual argument against this solution is that court procedures take a long time and do not correspond to the specific interests involved in collective administration of rights. Special tribunals are set up, in general, just to make the settlement of such disputes quicker and more cost-effective. Exceptionally, depending on the concrete political, economical and legal conditions, the approval by an administrative authority may also be justified.

288. In this respect, however, two basic principles should be taken into account. The first princi-

ple is that even if a tribunal or an administrative authority is competent to decide on these matters, the conditions for an impartial and unbiased decision should be guaranteed (through an appropriate composition of the competent body, by means of the possibility of appeal to courts, etc.). The second principle is that, in the case of the collective administration of exclusive rights, the interference into the setting of tariffs and other licensing conditions should be restricted to those cases where an actual abuse of monopoly position is involved, and only to the extent that is necessary to prevent or eliminate such an abuse. The latter principle—as an obligation of the countries party to the Convention—follows from the Berne Convention itself and more precisely from the fact that, although it was agreed at the 1967 Stockholm Revision Conference (and reflected in its report concerning the discussions on Article 17 of the Convention) that the member countries of the Berne Union may maintain copyright tribunals in this field, it was also made clear that such tribunals may only serve the purpose of taking measures against possible abuses of monopolies.

J. What principles should be applied in respect of monitoring uses and collecting fees?

289. There are three principles, in this field, which should be applied and which may be significant from the viewpoint of meeting certain standards under the Berne Convention and the Rome Convention.

290. The first principle is that the monitoring of uses and the collection of fees should be as comprehensive as possible, provided that the costs of such activities can still be kept on a reasonable level. This is an indispensable condition for guaranteeing that right owners enjoy their rights and receive remuneration as much in conformity with the actual use of their works as possible. Therefore, e.g., it is unacceptable to give up monitoring uses and collecting fees, in a certain field, where these activities still could be managed with reasonable costs just for the purpose to decrease the general cost level and to increase the remuneration for other categories of uses.

291. The second principle is that the equal treatment of right owners (which is discussed more in detail in subchapter N) should be applied also in this respect. The extent and intensity of the monitoring and collecting activities should be established in such a way that it does not prejudice the interests of particular categories of right owners.

292. Finally, the third principle is that appropriate legislative and administrative measures should facilitate the monitoring and collecting activities of collective administration organizations. The fullest possible cooperation in those fields should be prescribed as an obligation of users, and enforcement measures and sanctions should be available against users who create any unreasonable obstacles to such activities of collective administration organizations.

K. What costs of administration may be justified?

293. Hardly any other answer can be given to this question than that only those costs may be justified and may be deducted from the fees collected by the collective administration organizations which are reasonable and indispensable for the administration of the rights concerned.

294. In this respect, however, two further remarks should be made. First, it should be emphasized that not necessarily all the costs that may emerge as a result of the activities of a collective administration organization should be considered as costs pertaining to the collective administration of rights as such, because the organization may undertake some other activities too (in this respect, see also subchapter O below; concerning the deductions for some general cultural and/or social purposes, see subchapter M below).

295. The other remark is that the equal treatment of right owners should prevail also in the field of the deductions for costs. This principle contains two elements. The first one is that, in respect of authors whose works are utilized in the same manner, and, thus, the costs of the administration of the rights concerned are the same, the same percentage should be deducted for costs of administration. The second element is that if, in the case of certain categories of uses, the administrative costs are higher, the higher costs should be deducted from the remuneration to the right owners concerned and other categories of right owners should not be burdened by such higher costs.

L. Can it be justified not to distribute the sums collected for individual right owners but to use them for collective purposes?

296. Both the exclusive rights and the possible rights to remuneration are, in the Berne Convention and the Rome Convention, determined as the rights of individual right owners. Therefore, the

basic principle cannot be anything else but that the money collected by collective administration organizations should be distributed to those individual owners of rights whose rights have been used.

297. The fact that, in certain cases, individual uses cannot fully, and with absolute precision, be identified is not a sufficient basis for not distributing fees to individual right owners. The experience of collective administration in various fields clearly shows that it is always possible to find some basis on which, at least, a fairly reasonable "rough justice" can be achieved in the framework of the distribution of fees. In all the cases discussed in Chapter III above, there exist such bases for distribution. And, of course, a reasonable "rough justice" is much better from the viewpoint of right owners than no justice. (It is another matter that, in such systems, there may be a need for a reserve fund from which certain claims not covered by the distribution can be satisfied if asserted within a certain reasonable delay.)

298. There is a case where it may be justified that the remuneration collected is not distributed and is used for collective purposes; namely where the amount collected is low and the costs in connection with the distribution cannot be covered by a reasonable part of it.

M. Under what conditions may sums collected for right owners be used for purposes other than covering the actual costs of administration and the distribution to right owners?

299. It follows from the fact that the owners of exclusive rights and of the rights to remuneration administered by the collective administration organizations are individual right owners that no portion of the sums collected by such organizations should be used—without the permission of the right owners concerned—for purposes other than covering the actual costs of administration and for the distribution of the remaining amount to the right owners.

300. Such a permission may be granted in different ways, such as individually, case by case (which is not typical in practice), by accepting the conditions of membership in the organization (which is fairly frequent), through the decision of bodies representing right owners (which is also fairly frequent) or in the framework of mutual representation agreements between collective administration organizations (which is quite a general practice).

301. The purposes other than covering actual costs and distribution of sums to individual right

owners for which the use of a certain percentage of collected sums is authorized are, in general, cultural or social purposes. Cultural purposes mainly mean the use of certain amounts for the promotion of the creation of works (through prizes, competitions, fellowships, etc.), while social purposes usually involve the transfer of the money to health insurance or pension funds.

302. Collective administration organizations frequently stress that they should be allowed to use certain percentages of the collected sums for such purposes because such use corresponds to the wishes of the right owners and the right owners should be free to dispose of the income derived from their rights. Naturally, everyone is free to dispose of his money as he wishes. But such disposal must be based on decisions to which *all* the right owners expressly agree. "Expressly" means that if the right owners act through a representative—e.g., foreign right owners through their own or a third organization—such a representative should have not just a general authorization to act in their name but a specific (express) authorization that the organization may dispose of monies which otherwise would belong to them for the said social or cultural purposes, even where those monies are to be used for such purposes in foreign countries. In other words, and for example, an assembly which essentially consists of right owners who are nationals of the country of the society should not be entitled to exercise its generosity (whether for social or cultural purposes) by using the money also of foreign right owners. And this should not be admissible even where such a practice is based on "reciprocity" between the various societies, or on any methods of decision-making in which the foreign right owners or their duly authorized representatives do not *really* participate and do not know *exactly* how much less money they would receive because of social or cultural deductions.

303. It should, however, also be taken into account that it is fairly rare that right owners can take part directly in the decision concerning the use of a part of their fees for cultural and/or social purposes. In the majority of cases—as described in paragraph 300 above—they rather only indirectly accept such a practice. It cannot be forgotten either that the liberty of right owners who might not agree with such deductions is fairly restricted (and one can hardly allege that all right owners are equally altruistic and influenced by the idea of what is called the principle of solidarity between authors, performers, etc.). When they join or are considered to have joined the collective administration organization, the fact of deduction emerges as a part of a "take it or leave it" package. One can hardly

speak about real freedom of choice, e.g., in the case of foreign right owners who are absent and in whose name it is their collective administration organizations which agree to such deductions. Therefore, although the deduction of a certain percentage may be accepted on the basis of the existing legal practice, that percentage should be very low (in no case, more than 10%); otherwise serious doubts could emerge concerning such a practice.

304. It should be noted, however, that in the field of the so-called "Article 12" neighboring rights, somewhat different considerations might prevail. One of the recognized purposes of those rights is to counterbalance the losses that performers suffer by losing employment opportunities as a result of widespread uses of performances included in phonograms. For that reason, social considerations may be more decisive here than in the case of authors' rights and, thus, the use of a relatively higher percentage of the collected sums for social purposes may be justified.

305. It follows from the analysis above that national laws themselves are not allowed to provide for such deductions; at least, in respect of rights covered by the Berne Convention and the Rome Convention, they are not. There is a case, however, where further studies seem to be desirable, namely the case of the right to home taping royalties. Certain national laws restrict the money distributable to individual owners of rights by providing for the obligation of the collecting organizations to set aside a certain percentage for common purposes. The legal nature of such solutions, particularly their incompatibility with the principle of national treatment and with the obligation to provide for some compensation for private uses unreasonably prejudicing the legitimate interests of authors which seems to exist under Article 9(2) of the Berne Convention, must be the subject of special attention.

N. Is any discrimination by collective administration organizations (or by legislation regulating their activities) permissible to the detriment of right owners who are not members of such organizations and, particularly, those who are foreigners?

306. The answer to this question and, thus, the text of this subchapter may consist of one simple word: No! This is so, *inter alia*, because granting national treatment to foreigners to be protected under the Berne Convention and under the Rome Convention is a basic obligation of all countries party to those conventions. Nevertheless, there is a need for two remarks to this answer.

307. The first remark concerns the scope of the elements of collective administration in respect of which the principles of equal treatment of members and non-members, particularly foreigners, should prevail. It is obvious that the remunerations must be distributed to non-members and foreigners in exactly the same manner as to members and nationals. In addition to this basic element, equal treatment should also be fully respected, *inter alia*, in the fields of monitoring uses, collecting fees and deducting costs, as discussed in subchapters F and K above. However, in respect of the using of remunerations for purposes other than covering costs and distribution to right owners, the principle of equal treatment should not be applied formally. Such deductions are only allowed if non-members and foreigners, directly or indirectly (through their representatives), approve them. At the same time, it would be in grave conflict with the principles of equal treatment to try to introduce higher deductions from the remunerations of non-members and of foreigners than from members and nationals.

308. The other remark refers to what is discussed in paragraph 305 above from another viewpoint (from that of deductions for common purposes), namely to the status of that part of home taping royalties which, under certain national laws, must be set aside for common purposes of right owners. On the basis of a detailed analysis of the relationship between the provisions of Article 9(2) of the Berne Convention and the principle of national treatment under both the Berne Convention and the Rome Convention, it should be further studied what is, or what should be, the legal status of such deductions for common purposes from the viewpoint of national treatment. (It should be added that the right of individual authors, performers and phonogram producers to home taping royalties—in addition to certain minimum obligations that seem to exist under Article 9(2) of the Berne Convention—is clearly covered by the principle of national treatment as it has been underlined in various WIPO documents and at various WIPO meetings.)

O. What functions other than the actual collective administration of rights may a collective administration organization fulfill, and under what conditions?

309. Various collective administration organizations undertake activities other than collective administration of rights proper, such as agency activities for the promotion of the national repertoire and certain other general cultural activities.

310. The fulfillment of such other functions, in general, is not in conflict with the special interests involved in the actual collective administration of rights. It is important, however, to note that the costs of such activities should not burden—either directly or indirectly—the fees collected in the framework of collective administration. E.g., the costs of the promotion of the use of certain works by means of agency activities should either be covered by the commissions to be paid by the right owners directly interested in such an activity or by some other sources (e.g., from government subsidy), but never from the remunerations collected for the use of the works in respect of which certain rights are collectively administered.

311. It should be added, however, that it is not justified to interpret the scope of activities directly connected to the collective administration of rights in too restrictive a way. Not only the actual monitoring of uses, the collection and distribution of remunerations and enforcement belong to such activities, but also the legal service the organization provides to right owners, the educational and public relations activities that serve the better understanding and fuller respect of the rights collectively administered, etc.

312. The statement that the costs of fulfilling functions connected to the actual collective administration of rights should not be covered by the remunerations collected in the framework of such administration, of course, does not apply in respect of the activities mentioned in the preceding paragraph.

VI. Conclusions

313. As a result of the analysis of the main fields of collective administration of copyright and neighboring rights and of certain basic questions in relation to such administration, several general principles can be outlined and, at the same time, some problems can be identified in respect of which further studies seem to be necessary.

314. The principles which seem to be generally applicable in respect of collective administration of copyright and neighboring rights are the following:

(a) Collective administration of copyright and neighboring rights is justified where such rights—because of the number and other circumstances relating to the uses—cannot be exercised, in practice, on an individual basis. Collective administration should be applied, whenever possible, as an alternative to non-voluntary licenses. It is not advisable, however, to extend collective administra-

tion to rights that can be administered individually without any serious practical problem.

(b) Full collective administration includes authorization for uses, monitoring of uses, collection of remunerations and their distribution to right owners, when exclusive rights are involved. However, even if certain rights are restricted to a right to remuneration, collective administration is preferable as far as negotiation, collection and distribution are concerned.

(c) It depends on the political, economic and legal conditions and traditions of the countries concerned whether one single, general collective administration organization or separate organizations for various rights and various categories of right owners are more appropriate. The advantage of separate organizations is that, by means of them, the particular interests of certain right owners can more fully and directly prevail. The advantage of a general organization is that it can more easily settle the problems of emerging new uses and may more efficiently enforce the general interests of right owners. If there are parallel organizations, there is a need for close cooperation between them, and, sometimes, for joint actions by them in the form of specific "coalitions," while, in the case of a general organization, guarantees are needed to avoid neglecting the interests of certain categories of right owners.

(d) As a rule, there should be only one organization for the same category of rights in each country. The existence of two or more organizations in the same field may decrease or even eliminate the advantages of collective administration of rights.

(e) It also depends on the political, economic and legal conditions and traditions of the countries concerned whether public or private organizations are more appropriate for the collective administration of copyright and neighboring rights. In general, private organizations should be preferred. The conditions of certain countries (e.g. of those developing countries which are in the stage of establishment of their copyright infrastructure) may, however, make the setting up of public organizations desirable in order to safeguard right holders' interests.

(f) The prescription of obligatory collective administration of rights should be restricted to cases where such a measure is indispensable. Collective administration should not be made obligatory in respect of exclusive rights which, under the Berne Convention and the Rome Convention, may not be restricted to a mere right to remuneration.

(g) No extended collective administration clause (that is a statutory permission to use, without authorization, but against payment of remunerations, works belonging to the same category of

works in respect of which a collective administration organization authorized the use of its own repertoire) should be applied in the case of exclusive rights if, under the Berne Convention or the Rome Convention, those rights may not be restricted to a mere right to remuneration.

(h) The operation of blanket licenses granted by collective administration organizations should be facilitated by a legal presumption that such organizations have the power to authorize the use of all works covered by such licenses and to represent all the right owners concerned. At the same time, the collective administration organizations should give appropriate guarantees to the users to which such licenses are granted against individual claims of right owners and should indemnify them in case of any such claims.

(i) Adequate government supervision is necessary concerning the establishment and operation of collective administration organizations. Such a supervision should guarantee, *inter alia*, that only those organizations may be allowed to operate which can guarantee to provide all the legal, professional and material conditions that are necessary for an appropriate and efficient administration of rights; that the collective administration system should be available to all right owners who need it; that the terms of membership of the organizations should be reasonable and, in general, that the principles outlined in the present summary of guidelines (e.g. concerning the equal treatment of various categories of right owners, the deduction of costs and other possible sums and the distribution of remunerations) should be duly respected.

(j) The decisions concerning the methods and rules of collection and distribution of remunerations, and about other important general aspects of collective administration, should be taken by the right owners concerned or by the bodies representing them.

(k) For the right owners and for the other organizations (particularly for foreign ones) the rights or repertoires of which, respectively, are administered by a collective administration organization, regular and sufficiently detailed information should be available about the activities of the organization that may concern the exercise of those rights.

(l) Government supervision of, and interference in, the establishment and operation of tariffs and other licensing conditions applied by collective administration organizations which are in a *de facto* monopoly position vis-à-vis users, is only justified if, and to the extent that, such supervision and/or interference is indispensable for preventing abuses of such a monopoly position.

(m) Appropriate legislative and administrative measures should facilitate the monitoring and collecting activities of collective administration organizations. The fullest possible cooperation by users in those fields should be prescribed as an obligation, and enforcement measures and sanctions should be available against users who create any unreasonable obstacles to such activities of collective administration organizations.

(n) No remunerations collected by a collective administration organization should be used for purposes (e.g. for cultural or social purposes) other than covering the actual costs of administration and the distribution of the remunerations to the right owners, except where the right owners concerned, including foreign right owners, authorize such a use of the remunerations in a procedure where they or their duly authorized representatives have a real opportunity to effectively participate.

(o) The remunerations collected by a collective administration organization—after the deduction of the actual costs of administration and of other possible deductions that the right owners might authorize according to the preceding point above—should be distributed among the individual right owners as much in proportion to the actual use of their works as possible. Individual distribution may only be disregarded where the amount of remunerations is so small that distribution could not be carried out at a reasonable cost.

(p) Right owners who are not members of a collective administration organization, and particularly foreign right owners, should enjoy, in all respects (such as the monitoring of uses, the collection of remunerations, the deduction of costs and, especially, the distribution of remunerations), exactly the same treatment as those right owners who are members of the organization and nationals of the country.

(q) Collective administration organizations may fulfill tasks other than collective administration proper (such as agency activities), but the costs of such activities should not burden the fees collected in the framework of collective administration proper.

315. Further studies seem to be desirable concerning the following specific questions of collective administration:

(a) In which cases and under what conditions is collective administration of copyright and neighboring rights justified in the field of certain new technologies and new uses (such as electrocopying, data bases, rental and lending of copies of certain categories of works)?

(b) In which cases is it allowed, or should it be allowed, to prescribe obligatory collective administration of rights to be protected under the Berne Convention and the Rome Convention?

(c) What is, or what should be, the legal status of extended collective administration clauses from the viewpoint of the Berne Convention and the Rome Convention?

(d) What forms of government supervision of collective administration organizations are justified and concerning what aspects?

(e) What are the concrete conditions and limits of the application of antitrust measures in case of collective administration of copyright and neighboring rights?

(f) What should be the fate of the income collected for the use of works whose right holders cannot be identified within a reasonable period?

(g) How should a provision be judged that prescribes the use of a certain part of remunerations collected (e. g. home taping royalties) for collective purposes, and what legal basis, if any, may or should exist for such a provision under the Berne Convention and the Rome Convention?

(h) How should the collective payments mentioned in the preceding point be qualified from the viewpoint of the principle of national treatment?

ANNEX I

I

Extracts from the Draft Model Provisions for Legislation in the Field of Copyright (document CE/MPC/I/2-II)

CHAPTER VIII

COLLECTIVE ADMINISTRATION OF ECONOMIC RIGHTS

Section 51

Collective Administration of Economic Rights: In General

Authors of works may authorize collective administration organizations (such as authors' societies) to administer their economic rights. (See in this respect also Sections 9(2), 22(2), 23(3) and 25(3).)

Section 52

Functions of Collective Administration Organizations

Collective administration organizations—on behalf of, and on the basis of the authorization by, the authors

who are their members or whom they otherwise represent (e.g., on the basis of reciprocal agreements with foreign collective administration organizations)—may fulfill the following functions:

(i) to negotiate with users about the conditions of, and about the fees to be paid for, the authorizations to be given to do the acts covered by the exclusive economic rights administered by them and give such authorizations;

(ii) to negotiate with users about the amount of equitable remuneration where the right to such remuneration is administered by them;

(iii) to collect fees for the authorizations mentioned in point (i) and/or equitable remuneration mentioned in point (ii);

(iv) to distribute the fees and/or equitable remuneration thus collected among authors; and

(v) to do any further activities for which they have received authorization, in keeping with Section 53, from the authors or from the bodies representing the authors whose exclusive economic rights or rights to equitable remuneration they administer.

Section 53

Guarantees Against Unlawful Restrictions of Authors' Rights Administered by Collective Administration Organizations

(1) The exclusive economic rights and the rights to equitable remuneration administered by collective administration organizations shall not be restricted as a result of such collective administration. To guarantee the elimination of such restrictions

(i) all decisions about the methods and rules of collection and distribution of fees and about other important aspects of collective administration shall be taken by all the authors whose rights are administered or by bodies representing them;

(ii) the authors whose rights are administered by a collective administration organization shall receive regular, full and detailed information about all the activities of the collective administration organization that may concern the exercise of their rights;

(iii) without the express authorization by all the authors whose rights are administered (given directly or by the bodies representing them), no fees collected by a collective administration organization shall be used for any purposes (for example, for cultural or social purposes, or for financing promotion activities) other than the purposes of covering the actual costs of administration of the rights involved and of distributing the amounts of fees that remain after the deduction of such costs;

(iv) the amounts of fees collected by a collective administration organization shall—after the deduction of the actual costs of collective administration and other potential deductions that the authors may authorize in keeping with point (iii)—be distributed among the authors as much as possible in proportion to the actual use of their works.

(2) Foreign authors whose rights are administered by a collective administration organization (either directly or

on the basis of an agreement with foreign collective administration organizations by which such authors are directly represented) shall enjoy the same treatment as those authors—members of, or otherwise represented by, the collective administration organization—who are nationals of, or have habitual residence in, the country.

(3) Foreign collective administration organizations shall receive regular, full and detailed information of all the activities of a collective administration organization of the country—with which they have concluded an agreement on the reciprocal representation of the rights administered by them—that may concern the exercise of the rights of, and the distribution of fees to, the authors whose rights are administered by such foreign collective administration organizations.

II

Extracts from the Report of the First Session of the Committee of Experts on Model Provisions for Legislation in the Field of Copyright (Geneva, February 20 to March 3, 1989) (document CE/MPC/I/3)

CHAPTER VIII

COLLECTIVE ADMINISTRATION OF ECONOMIC RIGHTS

168. Different views were expressed as to the desirability of including a chapter on this subject matter in the model provisions. Some participants found such provisions appropriate, generally in the form suggested in the memorandum, while others proposed that they should be deleted or considerably reduced or put in an annex. Some participants referred to the need for some legislative support in relation to the activities of collective administration organizations, particularly as regards the treatment of works of authors who are not members of the organization. Mention was made in this context of the contents of various national laws.

169. Several participants underlined that collective administration was very useful in respect of certain categories of works and of certain rights, but was not appropriate in respect of others (such as audiovisual works and "grands droits").

170. Also, it was proposed to insert a reference to the non-lucrative character of the activities of collective administration organizations.

Section 51: Collective Administration of Economic Rights: In General

171. It was suggested that a more detailed mention should be made, in the provisions themselves or in the commentary, of various options as regards collective administration organizations, for instance, their establish-

ment as private organizations or as organizations under public law.

172. Some participants called attention to the relations between, on the one hand, Section 51 and, on the other hand, Section 46, concerning contracts on future works, and suggested that the latter section should not be applicable in respect of works administered by a collective administration organization. Observers from two international non-governmental organizations opposed that proposal.

173. Several participants underlined the voluntary nature of collective administration; as the word "may" in the text of the provision referred to it, authors should be free to choose whether they wanted their works administered in this way or not.

174. Attention was drawn to the need for supervision of the activities of collective administration organizations and various examples were mentioned about the mechanisms for such supervision (such as licensing of the organization by a public authority, approval of the statutes of the organization by such authority, appointment of government officials on the board of the society, etc.).

Section 52: Functions of Collective Administration Organizations

175. Mention was made of the important role which collective administration organizations could play in the promotion of national culture or of the use of works of their members, and it was suggested that that function should also be mentioned in the section.

176. It was also said that collective administration organizations should have legal personality and be able to represent their members, for instance, in civil and criminal proceedings, and that a reference should be made to such representation of the authors as to one of the functions of collective administration organizations.

177. As regards item (i), a reference was made to the fact that, in certain situations, the organization might not be allowed, under the law, to negotiate the fees, and it was proposed that the wording should be made more flexible. The same proposal was made concerning item (iv) in view of the fact that, in certain cases, distribution among individual authors was impossible or, at least, impractical.

Section 53: Guarantees Against Unlawful Restrictions of Authors' Rights Administered by Collective Administration Organizations

178. Several participants suggested that the title should be made more "neutral"; it should not refer to unlawfulness and it should rather read, for example, "Collection and Distribution of Fees."

179. Some participants, while expressing their appreciation for the safeguards provided for in respect of

authors, said that the model provisions should also contain safeguards for the benefit of the users and, generally, that the monopoly situation, in which a collective administration organization might be, should also be analyzed and regulated.

180. As regards paragraph (1), it was suggested that the first sentence of that paragraph should be deleted and the beginning of the second sentence should be modified accordingly.

181. In respect of paragraph (1), item (i), it was suggested that the reference to "all authors" was not realistic and that only the reference to representative bodies should be maintained or only a general reference should be made to relevant provisions in the statutes of the organization. Another suggestion was that the word "all" should be deleted.

182. Concerning paragraph (1), item (ii), it was said, *inter alia*, that it was not realistic to provide for full information in the early stages of the operations of a collective administration organization, and that, also in other cases, it was sufficient to refer to the right to information.

183. As regards paragraph (1), item (iii), some participants referred to the prohibition against setting aside fees for cultural and social purposes. On the one hand, it was said that political realities, sometimes, made provisions in national laws for such purposes necessary, and it was proposed that the provision should, therefore, be drafted in a more flexible way; on the other hand, some participants expressed their strong support for the provision as drafted. It was also suggested that the words within parentheses should be deleted.

184. In relation to the same point, it was proposed that the reference to authors should be replaced by a reference to bodies representing them. Furthermore, it was suggested that reference should be made not only to costs but also to "expenditure."

185. It was suggested that, in paragraph (1), item (iv), mention should be made not only of authors, in the sense of individual owners of rights but also of groups of such owners of rights or of "representative professional organizations" as it might, sometimes, be impossible or impractical to arrange for individual distribution of remuneration.

ANNEX II

Names of Collective Administration Organizations Mentioned in the Report by Their Abbreviations

ADAGP	Société des auteurs dans les arts graphiques et plastiques (France) Society of Authors in Graphic and Plastic Arts (France)	ARTISJUS	Szerzői Jogvédő Hivatal Hungarian Bureau for the Protection of Authors' Rights
		ASCAP	American Society of Composers, Authors and Publishers
		AUSTRO-MECHANA	Gesellschaft zur Wahrnehmung mechanisch-musikalischer Urheberrechte G.m.b.H. Society for the Collection of Mechanical Rights for Musical Works (Austria)
		BELFITEL	S.C. BELFITEL C.V. Gestion collective des droits de télédistribution (Belgique) Collective Administration of Teledistribution Rights (Belgium)
		BILD-KUNST	Society for the Rights of Artists (Federal Republic of Germany)
		BMDA	Bureau marocain du droit d'auteur Moroccan Copyright Bureau
		BMI	Broadcast Music, Inc. (United States of America)
		BONUS	Swedish Organization for Reproduction Rights
		BSDA	Bureau sénégalais du droit d'auteur Senegalese Copyright Office
		BUMA	Het Bureau voor Muziek-Auteursrecht Bureau for Copyright in Musical Works (Netherlands)
		CCC	Copyright Clearance Center (United States of America)
		CLA	Copyright Licensing Agency (United Kingdom)
		COPYDAN	Danish Organization for Reproduction Rights
		DACS	Design and Artists Copyright Society Ltd. (United Kingdom)
		DDG BEELD-RECHT	Beeldrecht Authors' Society (Netherlands)
		GEMA	Gesellschaft für musikalische Aufführungs- und mechanische Vervielfältigungsrechte Musical Performing and Mechanical Reproduction Rights Society (Federal Republic of Germany)
		GRAMEX	Collective Administration Organization for Performers and Producers of Phonograms (Denmark) (Finland)
		GVL	Gesellschaft zur Verwertung von Leistungsschutzrechten Society for the Administration of Performing Rights (Federal Republic of Germany)
		HUNGART	Művészeti Alap Art Fund (Hungary)
		JASRAC	Japanese Society for Rights of Authors, Composers and Publishers
		JUSAUTOR	Agentsija za avtorsko pravo Bulgarian Copyright Agency

LITERAR-MECHANA	Wahrnehmungsgesellschaft für Urheberrechte m.b.H. Collective Administration Society for Copyright (Austria)	SGDL	Société des gens de lettres (France) Society of Literary Authors (France)
LSG	Wahrnehmung von Leistungsschutzrechten Gesellschaft m.b.H. Collective Administration Society for Performing Rights (Austria)	SIAE	Società Italiana degli Autori ed Editori Italian Society of Authors and Publishers
MCPS	Mechanical Copyright Protection Society Limited (United Kingdom)	SOCADRA	Société camerounaise du droit d'auteur Copyright Society of Cameroon
NCB	Nordisk Copyright Bureau	SOCINPRO	Sociedad Brasileira de Interpretes e Produtores Fonográficos Brazilian Society of Performers and Producers of Phonograms
NIFF	IFPI Group (Sweden)	SODRAC	Société du droit de reproduction des auteurs, compositeurs et éditeurs au Canada Mechanical Rights Society for Authors, Composers and Publishers of Canada
ONDA	Office national du droit d'auteur (Algérie) National Office of Copyright (Algeria)	SPADEM	Société de la propriété artistique et des dessins et modèles (France) Society of Artistic Property and Designs and Models (France)
OSTIG	Oesterreichische Interpretengesellschaft Austrian Society of Performers	STIM	Svenska Tonsättares Internationella Musikbyrå Swedish Performing Rights Society
OSVU	Ochranné stredisko vykonnych umelcu Association for the Protection of Performers (Czechoslovakia)	SUISA	Société suisse pour les droits des auteurs d'oeuvres musicales Swiss Society for Authors' Rights in Musical Works
PPL	Phonographic Performance Limited (United Kingdom)	VAAP	Vsesojuznoje Agentstvo po Avtorskin Pravam Copyright Agency of the Soviet Union
PRS	The Performing Right Society Limited (United Kingdom)	VAGA	Visual Artists and Galleries Association, Inc. (United States of America)
REPRORECHT	Foundation Reprorecht (Netherlands)	VAM	Staatlich genehmigte Verwertungsgesellschaft Audiovisuelle Medien Collecting Society of Audiovisual Media (Austria)
SABAM	Société belge des auteurs, compositeurs et éditeurs Belgian Society of Authors, Composers and Publishers	VBK	Verwertungsgesellschaft Bilden der Künstler Oesterreichs Collecting Society for Artists (Austria)
SACD	Société des auteurs et compositeurs dramatiques (France) Society of Authors and Composers of Dramatic Works (France)	VECAI	Vereniging van Exploitanten en Macbtigingshouders van Centraele Antenne Inrichtingen Society of Operators of Central Antenna Installations (Netherlands)
SACEM	Société des auteurs, compositeurs et éditeurs de musique (France) Society of Authors, Composers and Music Publishers (France)	VG RUND-FUNK	Verwertungsgesellschaft Rundfunk Collective Administration for Broadcasting (Austria)
SADAIC	Sociedad Argentina de Autores y Compositores de Música Argentine Society of Authors and Music Composers	VIS-ART	VIS-ART Inc. (Canada)
SAMI	Svenska Artisters och Musikers Intresseorganisation Union of Swedish Musicians	VNG	Vereniging van Nederlandse Gemeenten Association of Communes in the Netherlands
SDRM	Société pour l'administration du droit de reproduction mécanique des auteurs, compositeurs et éditeurs de musique (France) Society for the Administration of the Mechanical Reproduction Rights of Authors, Composers and Music Publishers (France)	WISSENSCHAFT	Verwertungsgesellschaft WISSENSCHAFT Collective Society for Scientific Works (Federal Republic of Germany)
SEKAM	Stichting Tot Exploitatie van Kabeltelevisierechten op Audiovisueel Materiaal Society for the Exploitation of Cable Television Rights on Audiovisual Works (Netherlands)	WORT	Verwertungsgesellschaft WORT Collective Society for Literary Works (Federal Republic of Germany)
SESAC	SESAC Inc. (United States of America)	ZAIS	Stowarzyszenie Autorow "ZAIS" Authors' Society (Poland)
SGAE	Sociedad General de Autores de España General Society of Authors in Spain		

Calendar of Meetings

WIPO Meetings

(Not all WIPO meetings are listed. Dates are subject to possible change.)

1989

- November 27 to December 1 (Geneva)** **Committee of Experts on the Harmonization of Laws for the Protection of Marks (First Session)**
 The Committee will examine draft treaty provisions on the harmonization of laws for the protection of marks and will consider the proposed further contents of the draft treaty.
Invitations: States members of the Paris Union, the European Communities and, as observers, States members of WIPO not members of the Paris Union and certain organizations.
- December 1 (Geneva)** **Information Meeting for Non-Governmental Organizations on Intellectual Property**
 Participants in this informal meeting will be informed about the recent activities and future plans of WIPO in the fields of industrial property and copyright, and their comments on the same will be invited and heard.
Invitations: International non-governmental organizations having observer status with WIPO.

1990

- January 29 to February 2 (Geneva)** **Committee of Experts on the Interface Between Patent Protection and Plant Breeders' Rights (jointly organized by WIPO and the International Union for the Protection of New Varieties of Plants (UPOV))**
 The Committee will examine the interface between patent protection and plant breeders' rights, on the basis of documents of the International Bureau of WIPO and the Office of UPOV.
Invitations: States members of WIPO, UPOV or the United Nations and, as observers, certain organizations.
- February 19 to 23 (Geneva)** **Committee of Experts on the Settlement of Intellectual Property Disputes Between States (First Session)**
 The Committee will examine whether the preparation of a new treaty on the settlement of disputes between States in the field of intellectual property should start and, if so, with what content.
Invitations: States members of the Paris Union, the Berne Union or WIPO and, as observers, certain organizations.
- March 12 to 16 (Geneva)** **Working group on the application of the Madrid Protocol of 1989 (First Session)**
 This working group will consider the draft of new Regulations under the Stockholm Act of the Madrid Agreement Concerning the International Registration of Marks and the Protocol (adopted in Madrid in June 1989) relating to the said Agreement and will suggest other measures required by the co-existence of the Madrid (Stockholm) Agreement and the said Protocol.
Invitations: States members of the Madrid Union, States having signed or acceded to the Protocol, Greece, Ireland, the European Communities and, as observers, other States members of the Paris Union expressing their interest in participating in the Working Group in such capacity and certain non-governmental organizations.
- May 29 to June 1 (Geneva)** **Committee of Experts on the International Protection of Indications of Source and Appellations of Origin**
 The Committee will advise the International Bureau of WIPO on the possible conclusion of a new treaty on the international protection of indications of source and appellations of origin or the possible revision of the Lisbon Agreement for the Protection of Appellations of Origin and their International Registration and on the possibilities of increasing the use of the registration facilities of that Agreement.
Invitations: States members of the Paris Union and, as observers, certain organizations.

- June 5 to 8 (Geneva)** **Consultative meeting of developing countries on the harmonization of patent laws**
 This consultative meeting will, on the basis of working documents prepared by the International Bureau of WIPO, study problems of particular relevance to developing countries in connection with the preparation of a treaty on the harmonization of certain provisions in laws for the protection of inventions.
Invitations: Developing countries members of the Paris Union or WIPO.
- June 11 to 22 (Geneva)** **Committee of Experts on the Harmonization of Certain Provisions in Laws for the Protection of Inventions (Eighth Session)**
 The Committee will continue to examine a draft treaty on the harmonization of certain provisions in laws for the protection of inventions.
Invitations: States members of the Paris Union and, as observers, States members of WIPO not members of the Paris Union and certain organizations.
- June 11 to 22 (Geneva)** **Preparatory meeting for the diplomatic conference on the adoption of a treaty on the harmonization of patent laws**
 The preparatory meeting will prepare the organization of the diplomatic conference which will negotiate and adopt a new treaty on the harmonization of patent laws. The preparatory meeting will, in particular, establish the draft rules of procedure of the diplomatic conference and decide which States and intergovernmental and non-governmental organizations should be invited to the diplomatic conference and in what tentative capacity.
Invitations: States members of the Paris Union.
- June 25 to 29 (Geneva)** **Committee of Experts on the Harmonization of Laws for the Protection of Marks (Second Session)**
 The Committee will continue to examine draft treaty provisions on the harmonization of laws for the protection of marks.
Invitations: States members of the Paris Union, the European Communities and, as observers, States members of WIPO not members of the Paris Union and certain organizations.
- July 2 to 6 (Geneva)** **PCT Committee for Administrative and Legal Matters (Third Session)**
 The Committee will examine proposals for amending the Regulations under the Patent Cooperation Treaty (PCT), in particular in connection with the procedure under Chapter II of the PCT.
Invitations: States members of the PCT Union and, as observers, States members of the Paris Union not members of the PCT Union and certain organizations.
- July 2 to 13 (Geneva)** **Committee of Experts on Model Provisions for Legislation in the Field of Copyright (Third Session)**
 The Committee will continue to consider proposed standards in the field of literary and artistic works for the purposes of national legislation on the basis of the Berne Convention for the Protection of Literary and Artistic Works.
Invitations: States members of the Berne Union or WIPO and, as observers, certain organizations.
- September 24 to October 2 (Geneva)** **Governing Bodies of WIPO and of the Unions Administered by WIPO (Twenty-First Series of Meetings)**
 Some of the Governing Bodies will meet in ordinary session, others in extraordinary session.
Invitations: As members or observers (depending on the body), States members of WIPO or of the Unions and, as observers, other States and certain organizations.
- October 15 to 26 (Geneva)** **Committee of Experts Set up under the Nice Agreement (Sixteenth Session)**
 The Committee will complete the fifth revision of the classification established under the Nice Agreement Concerning the International Classification of Goods and Services for the Purposes of the Registration of Marks.
Invitations: States members of the Nice Union and, as observers, States members of the Paris Union not members of the Nice Union and certain organizations.
- *October 22 to 26 (Geneva)** **Committee of Experts on the Interface Between Patent Protection and Plant Breeders' Rights (Second Session) (jointly organized by WIPO and UPOV)**
 The Committee will continue to examine the interface between patent protection and plant breeders' rights.
Invitations: States members of WIPO, UPOV or the United Nations and, as observers, certain organizations.

* Dates particularly subject to possible change.

- October 29 to November 2 (Geneva)** **Committee of Experts on a Protocol to the Berne Convention (First Session)**
 The Committee will examine whether the preparation of a protocol to the Berne Convention for the Protection of Literary and Artistic Works should start, and—if so—with what content.
Invitations: States members of the Berne Union and, as observers, States members of WIPO not members of the Berne Union and certain organizations.
- October 29 to November 2 (Geneva)** **Working group on a possible revision of the Hague Agreement (First Session)**
 This working group will consider possibilities for revising the Hague Agreement Concerning the International Deposit of Industrial Designs, or adding to it a protocol, in order to introduce in the Hague system further flexibility and other measures encouraging States not yet party to the Hague Agreement to adhere to it and making it easier to use by applicants.
Invitations: States members of the Hague Union and, as observers, States members of the Paris Union not members of the Hague Union and certain organizations.
- *November 5 to 9 (Geneva)** **Committee of Experts on Measures Against Counterfeiting and Piracy (Second Session)**
 The Committee will continue to consider draft model provisions for national laws on protection against counterfeiting and piracy.
Invitations: States members of the United Nations or specialized agencies and, as observers, certain organizations.
- *November 19 to 23 (Geneva)** **Committee of Experts on the Settlement of Intellectual Property Disputes Between States (Second Session)**
 The Committee will continue the work it will have started during its first session (February 19 to 23, 1990).
Invitations: States members of the Paris Union, the Berne Union or WIPO and, as observers, certain organizations.
- November 26 to 30 (Geneva)** **Working group on the application of the Madrid Protocol of 1989 (Second Session)**
 The working group will continue the work it will have started during its first session (March 12 to 16, 1990).
Invitations: States members of the Madrid Union, States having signed or acceded to the Protocol, Greece, Ireland, the European Communities and, as observers, other States members of the Paris Union expressing their interest in participating in the Working Group in such capacity and certain non-governmental organizations.
- December 10 to 14 (Geneva)** **PCT Committee for Administrative and Legal Matters (Fourth Session)**
 The Committee will continue the work it will have started during its third session (July 2 to 6, 1990).
Invitations: States members of the PCT Union and, as observers, States members of the Paris Union not members of the PCT Union and certain organizations.
- 1991**
- January 28 to 30 (Geneva)** **Information meeting(s) on the revision of the Paris Convention**
 An information meeting of developing countries members of the Paris Union and China and, if it is so desired, information meetings of any other group of countries members of the Paris Union will take place for an exchange of views on the new proposals which will have been prepared by the Director General of WIPO for amending the articles of the Paris Convention for the Protection of Industrial Property which are under consideration for revision.
Invitations: See the preceding paragraph.
- January 31 and February 1 (Geneva)** **Assembly of the Paris Union (Fifteenth Session)**
 The Assembly will fix the further procedural steps concerning the revision of the Paris Convention and will take cognizance of the aforementioned proposals of the Director General of WIPO. It will also decide the composition of a preparatory meeting which will take place in the first half of 1991.
Invitations: States members of the Paris Union and, as observers, States members of WIPO not members of the Paris Union and certain organizations.
- *June 3 to 28** **Diplomatic Conference for the adoption of a treaty on the harmonization of patent laws**
 This diplomatic conference will negotiate and adopt a treaty on the harmonization of patent laws, which will supplement the Paris Convention as far as patents are concerned.
Invitations: To be decided by the preparatory meeting to be held from June 11 to 22, 1990 (see above).

* Dates particularly subject to possible change.

*November 18 to December 6

Diplomatic Conference on the Revision of the Paris Convention for the Protection of Industrial Property (Fifth Session)

The Diplomatic Conference will negotiate and adopt a new Act of the Paris Convention.

Invitations: States members of the Paris Union and, without the right to vote, States members of WIPO or the United Nations not members of the Paris Union as well as, as observers, certain organizations.

UPOV Meetings

(Not all WIPO meetings are listed. Dates are subject to possible change.)

1990

April 23 to 27 (a.m.) (Geneva)

First Preparatory Meeting for the Revision of the UPOV Convention

Invitations: Member States of UPOV.

April 27 (p.m.) (Geneva)

Consultative Committee (Forty-First Session)

The Committee will mainly discuss the outcome of the First Preparatory Meeting for the Revision of the UPOV Convention.

Invitations: Member States of UPOV.

June 25 to 29 (Geneva)

Second Preparatory Meeting for the Revision of the UPOV Convention

Invitations: Member States of UPOV.

October 15 and 16 (Geneva)

Third Preparatory Meeting for the Revision of the UPOV Convention

Invitations: Member States of UPOV.

October 17 (Geneva)

Consultative Committee (Forty-Second Session)

The Committee will prepare the twenty-fourth ordinary session of the Council.

Invitations: Member States of UPOV.

October 18 and 19 (Geneva)

Council (Twenty-Fourth Ordinary Session)

The Council will examine the reports on the activities of UPOV in 1989 and the first part of 1990 and approve documents for the Diplomatic Conference to Revise the UPOV Convention.

Invitations: Member States of UPOV and, as observers, certain non-member States and intergovernmental organizations.

Other Meetings in the Fields of Copyright and/or Neighboring Rights

Non-Governmental Organizations

1990

April 11 to 13 (Paris)

International Publishers Association (IPA): Copyright Symposium

May 8 to 11 (Washington)

Foundation for a Creative America: Bicentennial Celebration of the Enactment of the United States Patent and Copyright Laws

May 13 to 17
(Beetsterzwaag, Netherlands)

International Confederation of Societies of Authors and Composers (CISAC): Legal and Legislative Committee

May 28 to 30 (Helsinki)

International Literary and Artistic Association (ALAI): Study Days

October 8 to 14 (Budapest)

International Confederation of Societies of Authors and Composers (CISAC): Congress

* Dates particularly subject to possible change.